90-47

No. _____

In The

Supreme Court of the United States

October Term, 1989

STATE OF WISCONSIN,

Petitioner,

v.

LIONEL D. WALKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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QUESTIONS PRESENTED

1. Whether a timely objection is prerequisite to making a claim under *Batson v. Kentucky*,[1] thus precluding a black defendant in a criminal proceeding from obtaining relief under *Batson* when he does not object, at any time during the trial, to the prosecutor's peremptory strike of a black member of the jury venire and then makes the objection for the first time seventeen months after the jury convicts him.

2. Whether, assuming a timely objection is prerequisite to obtaining relief under *Batson*, the procedure for proving prejudice set forth in *Strickland v. Washington*[2] governs a claim of ineffective assistance of counsel based on defense counsel's failure to make a timely *Batson* objection.

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[1] 476 U.S. 79 (1986).

[2] 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW..... 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISION INVOLVED..... 2

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT 11

I. THE DECISION OF THE WISCONSIN SUPREME COURT INCORRECTLY APPLIES *BATSON v. KENTUCKY* AND PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW WITH RESPECT TO WHICH THE WISCONSIN DECISION CONFLICTS WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND OF UNITED STATES COURTS OF APPEALS..... 11

II. THE DECISION OF THE WISCONSIN SUPREME COURT PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW CONCERNING THE STANDARD FOR DETERMINING WHETHER AN ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN THE ATTORNEY FAILS TO OBJECT, AT ANY TIME DURING THE TRIAL, TO THE PROSECUTOR'S PEREMPTORY STRIKE OF A BLACK MEMBER OF THE JURY VENIRE 17

CONCLUSION 19

TABLE OF CONTENTS – Continued

Page

APPENDIX (Majority and Dissenting Opinions in Wisconsin Supreme Court; Decision and Order of Kenosha County Circuit Court; Excerpts from Transcript of Postconviction Motion Hearing) App-1

TABLE OF AUTHORITIES

Page

CASES:

Batson v. Kentucky, 476 U.S. 79 (1986) ..... *passim*

Calhoun v. State, 530 So. 2d 259 (Ala. Crim. App. 1988) 12

Government of Virgin Islands v. Forte, 806 F.2d 73 (1986), *on appeal after remand*, 865 F.2d 59 (3d Cir. 1989) 12

Irving v. State, 498 So. 2d 305 (Miss. 1986), *cert. denied*, 481 U.S. 1042, *reh'g denied*, 482 U.S. 921 (1987) 12

Jones v. Butler, 864 F.2d 348 (1988), *reh'g denied*, 868 F.2d 1271 (5th Cir.) (en banc), *cert. denied*, 109 S. Ct. 2090 (1989) 12

People v. Evans, 125 Ill. 2d 50, 125 Ill. Dec. 790, 530 N.E.2d 1360 (1988), *cert. denied*, 109 S. Ct. 3175 (1989) 12

Price v. State, 726 S.W.2d 611 (Tex. Ct. App. 1987) 12

State v. Holder, 155 Ariz. 83, 745 P.2d 141 (1987) (en banc) 12

State v. Walker, 154 Wis. 2d 158, 453 N.W.2d 127 (1990) ..... *passim*

Strickland v. Washington, 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984) ..... *passim*

United States v. David, 803 F.2d 1567 (11th Cir. 1986), *on remand*, 662 F. Supp. 244 (N.D. Ga. 1987), *aff'd*, 844 F.2d 767 (11th Cir. 1988) 14

United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987) 12, 13, 16

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION:

U.S. Const. amend. 14, § 1 2

STATUTE:

28 U.S.C. 1257 2

Wis. Stat. § 974.06 4

MISCELLANEOUS:

Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim. L. & Criminology 1 (1988) 12

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OPINIONS BELOW

The majority opinion and the dissenting opinion in *State v. Walker*[3] appear in the Appendix.

JURISDICTIONAL STATEMENT

Petitioner State of Wisconsin seeks review of a final decision of the Wisconsin Supreme Court reversing respondent Lionel D. Walker's criminal conviction for armed robbery in violation of Wisconsin statutes. The

[3] 154 Wis.2d 158, 453 N.W.2d 127 (1990)

decision held that when a county prosecutor peremptorily challenged a black member of the jury venire without objection from defense counsel, the State of Wisconsin denied Walker equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

The Wisconsin Supreme Court filed its decision in *State v. Walker* on April 2, 1990. The State of Wisconsin has filed this petition within 90 days of that date.

Section 1257 of Title 28, U.S.C., confers jurisdiction on this Court to review by writ of certiorari the Wisconsin Supreme Court's decision.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment 14:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE[4]

On April 30, 1986, this Court decided *Batson v. Kentucky*,[5] which prohibits prosecutors in certain circumstances from peremptorily removing potential petit jurors on racial grounds.

On September 25, 1986, the district attorney for Kenosha County, Wisconsin, filed a criminal complaint charging respondent Lionel D. Walker, a black man, with four counts of armed robbery committed during the period August 27 to September 1, 1986.

Jury selection for Walker's trial on all four counts occurred on December 15, 1986, in Kenosha County Circuit Court. Of the twenty venirepersons in the pool, one was black. To select the twelve-person petit jury, the prosecutor and defense counsel each used peremptory challenges to eliminate four members of the venire. On his third peremptory challenge, the prosecutor struck the black venireperson. Defense counsel did not object.

Walker's three-day jury trial began the same day. At its conclusion, the jury convicted him on all counts.

On July 11, 1988, nearly seventeen months after the jury verdict, Walker filed in Kenosha County Circuit

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[4] Most of the facts in this section are reported in the Wisconsin Supreme Court's decision. Additional facts cited in this petition will appear in the form "10:10" to refer to their location in the state appellate record; the first number refers to the appellate document number, and the second number refers to the page in that document.

[5] 476 U.S. 79 (1986).

Court a postconviction motion under Wis. Stat. § 974.06.[6] Relying on *Strickland v. Washington*,[7] Walker contended that his attorney rendered ineffective assistance when he failed to make a *Batson* objection to the district attorney's peremptory removal of the only black venireperson.[8]

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[6] Section 974.06 permits a defendant to raise a constitutional challenge to his or her conviction after the time for taking a direct appeal has expired.

[7] 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984).

[8] This petition concerns only the Wisconsin Supreme Court's disposition of the *Batson* issue, although Walker also asserted ineffective assistance based on his attorney's failure to move to suppress lineup and in-court identification evidence as the fruit of an allegedly unlawful arrest.

The opinion in *Walker* describes the circumstances of the arrest. Acting on information from Walker's nephew indicating that Walker had been involved in the theft of a motor vehicle, law enforcement officers executed a warrantless arrest of Walker in the fenced-in backyard of his home. *Walker*, 154 Wis.2d at 162 n.1, 453 N.W.2d at 128 n.1. The Wisconsin Supreme Court concluded that Walker's warrantless arrest within the curtilage of his home was illegal because the prosecutor failed to demonstrate exigent circumstances justifying the arrest. *Id.* at 184-85, 453 N.W.2d at 138. The supreme court remanded for further proceedings in the Kenosha County Circuit Court with respect to the admissibility of the lineup evidence and the in-court identification testimony.

The Wisconsin Supreme Court's resolution of the *Batson* issue compels a retrial even if the Kenosha County Circuit Court resolves all other issues in the State's favor.

On July 12, 1990, the Kenosha County Circuit Court will hold a hearing on the admissibility of the lineup evidence and

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On September 29, 1988, the trial court held a hearing on Walker's motion.[9] Walker's attorney testified that he had not known about *Batson* at the time of trial, although Walker had expressed to him before trial a belief that this Court had recently decided a case concerning peremptory challenges on racial grounds. Walker's attorney said if he had known of the decision, he would have objected to the prosecutor's peremptory exclusion of the black juror.

The prosecutor responded to Walker's evidence and offered two exhibits, which the court accepted without objection. The prosecutor remarked on the difficulty of reconstructing what happened during jury selection:

> [B]ut for Mr. Vetzner [defense appellate counsel] saying that Mr. Echols [the stricken venireman] was black, I have no knowledge or no recall that Mr. Ed Echols was a black person. I have nothing other – I have nothing in my file, nothing, that indicates he was a black man. I reviewed the court file and there's nothing, absolutely nothing in the court file that would indicate he is a black man. I assume, based on this record, that if Mr. Vetzner says he was a black man and if Mr. Sumpter [defense trial counsel] says he was a black man – obviously Mr. Vetzner wasn't there – Mr. Walker says Mr. Echols was a black man, that – and I can appreciate the Court taking the position that Mr. Echols was a black man, but for purposes of my recollection, until such time that the motion for post-conviction

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the in-court identification testimony. When the circuit court issues its ruling, petitioner will advise the Court of the decision.

[9] 82:1-153 (transcript of hearing). Excerpts of this transcript are reproduced in the Appendix to this petition.

relief was raised, I had no independent recall, nor do any of my notes reflect that Mr. Echols was a black man.

. . . .

It is difficult to go back in time and now try to recreate and reconstruct what was the thought going into the preemptory [sic] strikes by both the defense and the state. . . .

. . . It is my belief and recall that what, in fact, happened is that we were given a list of prospective jurors, I reviewed those prospective jurors and the questionnaires that would accompany those prospective jurors, and when we came in on the day of trial that list of prospective jurors was expanded, and then at the time then existing, I did not have in my possession sufficient amount of background or the list of jurors or the jury questionnaires relative to those other jurors that were called to be prospective jurors. . . .

Other than that information, I have no other recall or no other information as to Mr. Echols, and therefore *I am without sufficient memory or recall, based upon the delay of this motion, to be able to give any further justification as to why Mr. Echols was struck,* other than what I provided to the Court, which was the reasonable belief that I did not have sufficient enough background information at that time relative to that particular individual, and that would go to probably an argument of the delay.

I suspect that in terms of argument, maybe one of the problems here is that *it is incumbent upon the defense to make a timely objection, to inquire as to the circumstances, and not wait over two and some odd months – two years later, plus, for a decision or an explanation,* but that is my offer of proof relative to the striking of Mr. Echols.[10]

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[10] 82:120-23 (emphases added); App. 51-53.

In a written decision and order,[11] the trial court denied Walker's motion and affirmed his conviction. The court observed that "[d]ue to the passage of time the prosecutor is unable to remember even if one of the jurors was black and his notes make no mention of any thing concerning the juror in question."[12] The court also noted that "[t]he prosecutor in this case was not and is not known by the court to strike black jurors customarily from juries."[13]

In denying Walker's motion, the trial court applied (but did not cite) the *Strickland* test for ineffective assistance of counsel. The court determined that Walker's trial counsel erred in not making a *Batson* motion, but that the error did not constitute deficient performance by counsel.[14] The court also concluded that counsel's error did not deny Walker a fair trial[15] and therefore did not prejudice Walker's defense.[16]

Walker appealed to the Wisconsin Court of Appeals. He argued that the prejudice analysis under *Strickland*

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[11] 89:1-8; App. 41-48.

[12] 89:5; App. 45.

[13] *Id.*

[14] *Id.*

[15] "There has been no showing that the error of the defense attorney was so serious as to deprive the defendant of a fair trial. This court believes that the result would be the same if the jury was all black or all white or a mixture of races. This court is confident that the result of the trial is reliable. Therefore, the defendant as to this point has not shown ineffective assistance of counsel." 89:6; App. 46.

[16] *Id.*

should be determined according to *Batson* procedures. According to Walker, when the basis for a *Strickland* claim rests on a failure to object to a prosecutor's peremptory strike of a prospective juror of the defendant's race, the *Batson* presumption of prejudice satisfies defendant's burden under the prejudice prong of *Strickland*. The prosecutor can then prevail only by rebutting the presumption according to *Batson* standards. In effect, an alleged *Batson* violation causes the burden of proof and persuasion with respect to *Strickland*'s prejudice standard to shift to the prosecutor rather than remain with the defendant as *Strickland* specifies.

The State treated the issue as an ordinary *Strickland* claim. In the State's view, the burden remained with Walker to prove both that his lawyer rendered deficient performance and that any deficient performance resulted in prejudice within the meaning of *Strickland* (i.e., "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").[17] The State argued that even if Walker had proven deficient performance, the trial court correctly concluded that he had not shown prejudicial impact.[18]

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[17] *Strickland*, 466 U.S. 695.

[18] Walker has not claimed that he did not receive a fair trial from the jury that actually heard his case. Even at the postconviction motion hearing, Walker disclaimed any assertion that the jury had not given him a fair trial (82:102) or that he saw the jury selection issue in racial terms (82:103). Rather, he asserted that he did not believe he could receive a fair trial

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The Wisconsin Court of Appeals certified Walker's case to the Wisconsin Supreme Court, which accepted the certification. The parties did not file additional briefs.

At oral argument, Walker reiterated the contention that when a *Batson* violation forms the basis for a *Strickland* claim of ineffective assistance of counsel, *Batson* standards for determining the existence of racial prejudice constituted the prejudice standard for *Strickland* analysis.

The State argued that *Batson* standards shifting the burden to the prosecutor apply only when a defendant timely objects to the prosecutor's peremptory strike. If defense counsel fails to object timely, the defendant bears the burden of showing that the failure created prejudice within the meaning of *Strickland*.

In a 5-2 decision issued on April 2, 1990, the Wisconsin Supreme Court reversed Walker's conviction and remanded for a new trial because of the prosecutor's peremptory dismissal of the black venireman.[19] The majority treated the lack of a timely objection as a procedural matter that only affected Walker's right to appellate review under state law. The majority exercised the court's discretionary authority to review Walker's claim

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in Kenosha because of pretrial publicity given the case (82:102-03). The remedy for that concern, however, would have been a change of venue. *Cf.* 82:33-34 (defense counsel testifying about discussions with Walker concerning change of venue), 63-64 (defense counsel explaining reasons for not moving for change of venue).

[19] *Walker*, 154 Wis.2d at 168-79, 453 N.W.2d at 131-36.

and then applied *Batson* standards to determine whether the prosecutor had improperly stricken the black venireman. The majority concluded that Walker had made a prima facie case under *Batson*.[20] The majority then concluded that the explanation the prosecutor advanced at the postconviction hearing did not, under *Batson*, adequately rebut the presumption of racial discrimination.[21] Because the court resolved Walker's appeal on *Batson* grounds, the court did not reach the question of ineffective assistance of counsel.[22]

In dissent, two justices wrote that this Court "contemplated that a minority defendant would object to the prosecutor's allegedly discriminatory use of peremptory challenges before members of the venire are dismissed and before the jury is empanelled. *Batson*, 476 U.S. at 99-100 n. 24."[23] Agreeing with the State's position, the dissenters concluded that a defendant who does not make a timely objection to a prosecutor's allegedly discriminatory use of peremptory challenges should have the claim reviewed "under the prejudice analysis of *Strickland*,"[24] not under the *Batson* standard.

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[20] *Walker*, 154 Wis.2d at 177-78, 453 N.W.2d at 135-36.

[21] *Walker*, 154 Wis.2d at 178-79, 453 N.W.2d at 135-36.

[22] *Walker*, 154 Wis.2d at 170, 453 N.W.2d at 132.

[23] *State v. Walker*, 154 Wis.2d 158, 194, 453 N.W.2d 127, 142 (1990) (Ceci and Day, JJ., dissenting).

[24] *Walker*, 154 Wis.2d at 194 n.1, 453 N.W.2d at 142 n.1 (Ceci and Day, JJ., dissenting).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE WISCONSIN SUPREME COURT INCORRECTLY APPLIES *BATSON v. KENTUCKY* AND PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW WITH RESPECT TO WHICH THE WISCONSIN DECISION CONFLICTS WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND OF UNITED STATES COURTS OF APPEALS.

This Court should grant review because the Wisconsin Supreme Court's resolution of a substantial question of federal law incorrectly applies the controlling precedent of this Court and conflicts with decisions of other state supreme courts and of United States courts of appeals.

In *Batson*, this Court granted Batson relief because he "made a *timely* objection to the prosecutor's removal of all black persons on the venire."[25] The decision, however, did not elaborate on the significance of that reference.

Walker treats this Court's reference in *Batson* to "a timely objection" as a procedural consideration bearing on an appellate court's power to grant review despite a procedural default. Other courts, however, have interpreted this Court's reference as meaning that a failure to make a timely objection bars relief under *Batson*.

In applying *Batson* despite Walker's failure to raise any objection until nearly seventeen months after the trial ended, the Wisconsin Supreme Court's decision directly conflicts with decisions of other state courts of last resort and of United States courts of appeals that have interpreted and applied this portion of *Batson*. Faced with untimely objections to a prosecutor's peremptory

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[25] 476 U.S. at 100 (emphasis added).

exclusions, these other courts have held that a timely objection is essential to obtaining relief under *Batson*.[26] Intermediate appellate courts have reached the same result in states in which the highest court has not yet ruled.[27]

This Court should resolve the conflict for several reasons. First, the Wisconsin Supreme Court's decision, if accepted elsewhere, will lead to inconsistent application of federal law. In jurisdictions (such as those identified in notes 26 and 27) that reject the *Walker* interpretation of *Batson*, a defendant must make a timely objection to

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[26] *See, e.g., Jones v. Butler*, 864 F.2d 348, 370 (1988) ("The Supreme Court's analysis in *Batson* presumed that an objection would be made promptly, probably before the venire was dismissed."), *reh'g denied*, 868 F.2d 1271 (5th Cir.) (en banc), *cert. denied*, 109 S.Ct. 2090 (1989); *id.* at 368-69 ("[A] contemporaneous objection is a necessary predicate for stating a *Batson* claim."); *United States v. Forbes*, 816 F.2d 1006, 1011 (5th Cir. 1987); *Government of Virgin Islands v. Forte*, 806 F.2d 73, 76-77 (1986), *on appeal after remand*, 865 F.2d 59 (3d Cir. 1989); *State v. Holder*, 155 Ariz. 83, 745 P.2d 141, 143 (1987) (en banc); *People v. Evans*, 125 Ill. 2d 50, 125 Ill. Dec. 790, 530 N.E.2d 1360, 1364 (1988) ("*Batson* requires that the defendant make a timely objection to the prosecutor's peremptory challenge."), *cert. denied*, 109 S.Ct. 3175 (1989); *Irving v. State*, 498 So.2d 305, 318 (Miss. 1986) (failure to make timely objection "goes beyond a mere procedural default. The rationale of *Batson* is entirely premised on the idea that the trial court will hear the challenge to the jury and decide whether the prosecutor has used his peremptory challenges in a discriminatory fashion."), *cert. denied*, 481 U.S. 1042, *reh'g denied*, 482 U.S. 921 (1987). *See also* Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim. L. & Criminology 1, 18-20 (1988).

[27] *See, e.g., Calhoun v. State*, 530 So.2d 259, 264 (Ala. Crim. App. 1988); *Price v. State*, 726 S.W.2d 611, 612-13 (Tex. Ct. App. 1987).

obtain relief under *Batson*. In Wisconsin and other jurisdictions that accept the *Walker* interpretation, however, a defendant can obtain relief under *Batson* without making a timely objection. In effect, *Batson* will come to mean different things in different jurisdictions and produce fundamentally different results in cases that are, practically speaking, factually indistinguishable.

Second, the Wisconsin court's approach poses enormous practical problems for prosecutors and courts. Under *Walker*, a defendant may raise a *Batson* objection at any time, including long after the return of a verdict. But an objection first made even at the end of trial will usually come too late for a prosecutor to remember the reasons for a particular peremptory strike.[28] An objection first made long after jury selection occurs, as happened in Walker's case, simply compounds the problem: as the prosecutor here remarked, he could not remember his reasons because of the lengthy delay in making the motion.[29]

In Wisconsin alone, the Wisconsin Supreme Court's decision exposes nearly every criminal case tried since April 30, 1986, to review in light of *Batson*, and most of those to probable reversal. The exclusion of even one juror on racial grounds violates a defendant's constitutional right even when other jurors of the same

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[28] *Cf. Forbes*, 816 F.2d at 1011 ("The 'timely objection' rule is designed to prevent defendants from 'sandbagging' the prosecution by waiting until trial has concluded unsatisfactorily before insisting on an explanation for jury strikes that by then the prosecutor may largely have forgotten.").

[29] 82:120-23; App. 51-53.

race are empanelled,[30] and most jury selections will include a prosecutor's peremptory strike of at least one venireperson of the defendant's race. Because *Batson* establishes a low threshold for making a prima facie case of racial discrimination,[31] prosecutors will frequently find themselves required to bear the burden of disproving racial discrimination under *Batson*. The lack of timely notice, however, will routinely preclude prosecutors from having available any rebuttal except general denials of discriminatory intent – denials inadequate under *Batson* to refute the prima facie case. To the extent other jurisdictions accept the Wisconsin Supreme Court's approach, review and reversal of criminal convictions becomes increasingly problematic.

Third, in dispensing with the requirement of a timely objection, the Wisconsin Supreme Court's approach does not advance the interest *Batson* seeks to protect: selection of a jury untainted by a prosecutor's racial discrimination. Allowing a delay between jury selection and notice of a *Batson* objection does not contribute to that goal; indeed, such a delay increases rather than diminishes the likelihood of an erroneous reversal. A prosecutor who

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[30] *See, e.g., United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986), *on remand*, 662 F. Supp. 244 (N.D. Ga. 1987), *aff'd*, 844 F.2d 767 (11th Cir. 1988).

[31] *Batson* requires, first, that a defendant "show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race," *Batson*, 476 U.S. at 96, and, second, that the "facts and any other relevant circumstances raise an inference that the prosecutor used that practice [of peremptory challenges] to exclude the veniremen from the petit jury on account of their race," *id.*

has legitimate nonracial reasons for a peremptory challenge but who has no notice that a defendant wants an explanation of the strike does not have any reason to remember the reason or reasons. (Without timely notice, a prosecutor could easily and legitimately conclude that the defendant shared the prosecutor's desire to remove the venireperson from the jury.) Months later, however, the prosecutor who could have offered a legitimate reason at jury selection will be able to offer only general denials insufficient to rebut the *Batson* presumption of discrimination arising from a defendant's prima facie case. Under the Wisconsin Supreme Court's approach, the defendant obtains a new trial, even though the original jury had not been selected in a discriminatory manner.

As other courts have recognized, the requirement of a timely objection lies at the core of *Batson* and is more than a procedural nicety. The objection alerts the court and prosecutor to the defendant's concern about the prosecutor's exercise of peremptory challenges and about the possibility of a violation of federal constitutional protections. The objection puts the prosecutor on notice that he or she may have to provide an explanation for a peremptory challenge.[32] The objection allows the court to make a

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[32] As the dissent in *Walker* noted, many of the cases cited by the *Walker* majority involved timely objections. *Walker*, 154 Wis.2d at 194 n.1, 453 N.W.2d at 142 n.1. (Ceci and Day, JJ., dissenting). When a defendant makes a timely objection, a delayed hearing on the objection (as occurred in *Batson*) does not disadvantage the prosecution: the prosecutor had notice that at some point, an explanation for a peremptory challenge may be required. The prosecutor can thus be expected to

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contemporaneous assessment of the prosecutor's credibility in offering an explanation.[33] The objection allows the court to correct an improper peremptory strike by seating the challenged juror rather than ordering a new trial. And the objection precludes the defendant from "sandbagging" the prosecution.[34]

This Court has not definitively explained what it meant by its reference to Batson's "timely objection." Other courts have concluded that this Court intended a timely objection to function as the necessary first step in asserting a claim pursuant to *Batson*. A majority on the Wisconsin Supreme Court has set up a competing interpretation: that a timely objection is merely a procedural matter bearing on a defendant's right of appellate review and is a procedural default waivable in the discretion of a reviewing court.

The State of Wisconsin believes the Wisconsin Supreme Court's view incorrectly applies *Batson*. The State of Wisconsin therefore urges this Court to grant the

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recollect even months or years later (presumably through contemporaneous notes) why a particular juror was challenged peremptorily.

[33] In *Batson*, the Court noted that "the trial judge's findings *in the context under consideration here* largely will turn on evaluation of credibility." *Batson*, 476 U.S. at 98 n.21 (emphasis added). The *Batson* context included a timely objection.

[34] *Forbes*, 816 F.2d at 1011 ("The 'timely objection' rule is designed to prevent defendants from 'sandbagging' the prosecution by waiting until trial has concluded unsatisfactorily before insisting on an explanation for jury strikes that by then the prosecutor may largely have forgotten.").

petition and reverse the decision of the Wisconsin Supreme Court.

II. THE DECISION OF THE WISCONSIN SUPREME COURT PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW CONCERNING THE STANDARD FOR DETERMINING WHETHER AN ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN THE ATTORNEY FAILS TO OBJECT, AT ANY TIME DURING THE TRIAL, TO THE PROSECUTOR'S PEREMPTORY STRIKE OF A BLACK MEMBER OF THE JURY VENIRE.

If the Court concludes that a timely objection is prerequisite to obtaining relief under *Batson*, the Court should determine whether the procedure for proving prejudice set forth in *Strickland v. Washington*,[35] governs a claim of ineffective assistance of counsel based on defense counsel's failure to make a timely *Batson* objection. Although the parties argued the issue in the Wisconsin courts, the Wisconsin Supreme Court avoided answering this question by granting Walker relief directly under *Batson*. The issue requires resolution by this Court to ensure uniform and fair application of federal law.

Walker originally challenged his conviction by claiming ineffective assistance of counsel under *Strickland*. At the conclusion of the hearing on Walker's postconviction motion, Walker's appellate counsel conceded that he had not shown prejudice within the meaning of *Strickland*.[36]

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[35] 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984).

[36] 82:135; App. 60 ("I concede that I have not established prejudice in the traditional sense of how it would affect the outcome").

He contended, however, that *Batson* rather than *Strickland* should control the prejudice analysis when a *Batson* claim forms the basis for an allegation of ineffective assistance of counsel.

In effect, Walker urged modification of the *Strickland* standard for assessing the prejudicial effect of an attorney's deficient performance when the *Strickland* claim is based on an untimely *Batson* objection. Under *Strickland*, a defendant bears the burden of proving that defense counsel's deficient performance had a prejudicial effect on the defense effort (i.e., of proving that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").[37] Walker proposed that a defendant making a *Batson* claim under *Strickland* would satisfy the *Strickland* burden by establishing a prima facie case pursuant to *Batson*'s procedure. At that point, the burden would shift to the prosecutor to rebut the prima facie case, as under *Batson*. If the prosecutor failed to satisfy the *Batson* standard for refuting the prima facie case, the defendant would have satisfied *Strickland*'s standard for proving ineffective assistance of counsel.

Under Walker's theory, the *Batson* standard ultimately controls even when a defendant fails to make a timely objection.

If the Court grants this petition and holds that a timely objection is prerequisite to obtaining relief under *Batson*, the Court should also address the issue of which

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[37] *Strickland*, 466 U.S. at 695.

standard – *Strickland* or *Batson* – controls resolution of a claim of ineffective assistance of counsel based on counsel's failure to raise a *Batson* objection. In petitioner's view, the issue is an unavoidable contingency of the principal issue raised by this petition. If a defendant must make a timely objection to obtain *Batson* relief, a claim of ineffective assistance of counsel under *Strickland* will become the remedy of choice when defense counsel fails to make a timely *Batson* objection, and state and lower federal courts will immediately face the question of which standard to use. An answer by this Court will ensure uniform and fair application of federal law to these cases.

CONCLUSION

The Wisconsin Supreme Court's decision incorrectly applies this Court's decision in *Batson v. Kentucky* and creates a significant conflict among jurisdictions in the application of *Batson*. The decision poses a substantial risk of inconsistent application of federal law and creates substantial and unwarranted practical problems for courts and prosecutors. The decision also raises a substantial question concerning the standard for deciding a claim of ineffective assistance of counsel based on defense counsel's failure to make a timely *Batson* objection. This Court should grant this petition for *certiorari* and both resolve the conflicting interpretations of *Batson* and set forth the appropriate standard for assessing ineffective assistance of counsel when a defendant fails to make a timely *Batson* objection.

Dated this 2nd day of July, 1990.

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No. 88-2058-CR

STATE OF WISCONSIN IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LIONEL D. WALKER,

Defendant-Appellant.

APPEAL from a judgment and order of the Circuit Court for Kenosha County, Jerold W. Breitenbach, Circuit Judge. *Reversed.*

CALLOW, WILLIAM G., J. This case is before this court on certification from the court of appeals pursuant to sec. (Rule) 809.61., Stats. The defendant-appellant Lionel D. Walker (Walker) appeals from a judgment of conviction and an order denying his motion for post-conviction relief of the Circuit Court for Kenosha County, Judge Jerold W. Breitenbach.

Walker, who is black, raises three issues on appeal. First, Walker contends that he was denied his federal and state constitutional right to effective assistance of counsel because his counsel did not object when the prosecutor used a peremptory challenge to exclude the only black person from the petit jury. Second, Walker claims he was denied his federal and state constitutional right to effective assistance of counsel when his counsel failed to move to suppress lineup and in-court identifications as the forbidden fruits of an allegedly unlawful arrest. Third,

Walker argues that the circuit court erred in refusing to admit evidence concerning a crime that occurred when he was incarcerated and that he claims was similar to those for which he was on trial.

We first conclude that Walker has established, prima facie, that the prosecutor used a peremptory challenge in a racially discriminatory manner during the jury selection process at his trial, that the prosecutor's explanation for the challenge was not sufficient to rebut the prima facie case, and that, as a result, Walker's conviction must be reversed and he is entitled to a new trial. We further conclude that Walker's arrest was unlawful and that, on remand, the circuit court must determine whether the lineup identification evidence must be suppressed as the fruit of the unlawful arrest. If the circuit court determines that the lineup evidence should be suppressed as the fruit of the unlawful arrest, then the court must determine whether any in-court identification must be suppressed. We finally conclude that the circuit court did not err in excluding evidence concerning a crime that occurred while Walker was incarcerated.

We begin by setting forth the facts relevant to the issues raised by Walker. Between August 27, 1986 and September 1, 1986, armed robberies, which were executed in similar fashion, occurred in four city of Kenosha taverns: Jesse's Bar, V.J.'s Lounge, Friar Pub Tavern, and the Kenosha Tap. In all four cases, a black man entered the tavern, ordered Old Style beer, and then, speaking quietly, told the bartender to give him the money from the cash register. In each case, the man held his right arm inside his outer garment to create the appearance that he had a gun and departed immediately after receiving the

money. All four robberies occurred in either the late evening or early morning hours, prior to the tavern's closing.

On September 4, 1986, at approximately 9:15 p.m., Walker was arrested in the fenced-in backyard of his home.[1] The arrest was made without a warrant. The next morning Walker, who was a suspect in the four above-mentioned armed robberies, was placed in a lineup consisting of six black males.[2] The eyewitness to the robbery at Jesse's Bar positively identified Walker. The eyewitness to the robbery at V.J.'s Lounge made a tentative identification of Walker, as did the eyewitness to the Friar Pub Tavern robbery. Two eyewitnesses to the Kenosha Tap robbery viewed the lineup. One eyewitness was unable to identify anyone, while the other positively identified Walker.

On September 25, 1986, a criminal complaint was filed, charging Walker with four counts of armed robbery. Prior to trial, Walker's counsel filed two motions that are relevant to the arguments Walker raises on appeal. First, on September 30, 1986, Walker's counsel filed a motion to dismiss the action on the ground that the court lacked jurisdiction because Walker was brought before the court pursuant to an illegal arrest. The circuit court denied the

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[1] The trial judge apparently found at the post-conviction hearing that the arrest was made on the basis of a statement made by Walker's nephew concerning Walker's possible involvement in the theft of a van, not on the basis of suspicion of armed robbery.

[2] Apparently, a parole hold was placed on Walker sometime the day of the lineup, September 5, 1986.

motion to dismiss, citing *State v. Smith*, 131 Wis. 2d 220, 388 N.W. 2d 601 (1986), in which this court held that an illegal arrest would no longer deprive the court of personal jurisdiction over the defendant. Second, on November 7, 1986, Walker's counsel filed a motion to suppress evidence with respect to lineup, photographic, and in-court identifications of Walker on the ground that any such identification would violate multiple federal and state constitutional rights. Walker's counsel orally withdrew this motion at a December 5, 1986 hearing, explaining, in part, as follows:

> I have realized that since I made the motion, that Mr. Walker was represented by an attorney from the Public Defender's Office . . . at the lineup, and . . . no objections as to police procedures . . . were made by her at that time. . . . I don't . . . have any independent evidence at this time to support my burden . . . [with respect to] that motion. . . . If there would be any information between now and then gathered until the time of trial, I would renew it, but at this time I am not aware of any.

The jury was selected for Walker's trial on December 15, 1986. Of the twenty venirepersons, one was black. During the voir dire examination of potential jurors, the black venireperson did not answer in a way that would suggest a disqualifying attitude to any general questions directed at the pool of jurors by the judge or by the lawyers, nor did the court or counsel ask the black venireperson any specific questions. Because only twelve people ultimately would serve as jurors at Walker's trial, the prosecutor and defense counsel each were allowed to use peremptory challenges to eliminate four venirepersons from the pool of twenty. With the third of his four

peremptory challenges, the prosecutor eliminated the black venireperson. Defense counsel did not object.

Walker's three-day jury trial on the four counts of armed robbery commenced on December 15, 1986. During its case-in-chief, the prosecution introduced lineup evidence from all five eyewitnesses, and each eyewitness made an in-court identification of Walker as the perpetrator of the crime that each had observed. In addition, evidence that two eyewitnesses had identified Walker at Walker's preliminary examination was also introduced by the prosecution.

The theory of defense was that the four armed robberies in question had been committed by someone else, Walker having been misidentified as the perpetrator. In an effort to prove that theory, Walker introduced evidence about two armed robberies that occurred while he was incarcerated pending his trial for the four armed robberies in question. These two armed robberies were similar to the four for which Walker was standing trial. However, the circuit court prevented Walker from introducing evidence about an armed robbery that was also similar in some respects to the crimes for which Walker had been charged and that also occurred when Walker was incarcerated. According to Walker's offer of proof, which consisted of the police reports concerning that armed robbery, the perpetrator was a black male with light skin tone and liver spots on his face. The trial judge excluded evidence about this crime because no eyewitnesses to the crimes for which Walker had been charged had described the perpetrator as having light skin tone and liver spots.

At the conclusion of the trial, the jury found Walker guilty of all four counts of armed robbery in violation of sec. 943.32(1)(b)(2), Stats. On January 28, 1987, the circuit court sentenced Walker to ninety-nine years imprisonment, as a repeater.

On July 11, 1988, Walker filed a post-conviction motion, alleging that he was denied his state and federal constitutional right to effective assistance of counsel. Walker asserted that his trial counsel was ineffective in two respects. First, Walker claimed that trial counsel was ineffective because he failed to make a *Batson*[3] objection when the prosecutor used a peremptory challenge to remove the only black person from the venire. Second, Walker alleged trial counsel was ineffective because he did not attempt to suppress lineup and in-court identification evidence as the fruit of his allegedly unlawful arrest.

A hearing was held on the post-conviction motion on September 29, 1988, at which Walker's trial counsel testified. With respect to his failure to make a *Batson* objection, trial counsel testified that prior to trial Walker had expressed reservations about being tried by an all-white jury and that Walker wanted blacks on the jury. Trial counsel testified that he would not have used a peremptory challenge to strike the only black person from the venire. According to trial counsel, at the time of trial, he was unaware of the relatively-recent *Batson* decision, which placed limitations on the prosecution's ability to

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[3] *Batson v. Kentucky*, 476 U.S. 79 (1986).

eliminate venirepersons of defendant's race with peremptory challenges. Trial counsel stated that he should have known about the *Batson* decision. He would have made a proper objection when the prosecutor used a peremptory challenge to eliminate the only black venireperson, trial counsel testified, had he known about the *Batson* decision. Walker, himself, apparently had knowledge of the *Batson* decision. Trial counsel testified that Walker informed him that the prosecutor's use of a peremptory challenge to exclude from the petit jury the only black venireperson may have been unlawful in light of a newspaper article Walker had read about the *Batson* decision.

With respect to his failure to attempt to suppress the line-up and the in-court identification evidence, trial counsel testified that he knew at trial that Walker was arrested in the backyard of his home without a warrant. Trial counsel further testified that he knew that it was unlawful to make an arrest at a suspect's home without a warrant, but that he never thought to challenge the identifications as the fruit of an unlawful arrest. Trial counsel made it clear that he would have preferred to have the identification evidence excluded.

The prosecutor also appeared at this hearing. With respect to the *Batson* issue, the prosecutor stated that he had no memory of any venireperson being black and that, in any event, he had no discriminatory intent. The prosecutor asserted that a review of his notes from the jury selection process showed a possible explanation for his use of a peremptory challenge on the sole black venireperson: he simply had no information about him. With respect to the failure of Walker's trial counsel to attempt to suppress the identifications of Walker by the

witnesses, the prosecutor asserted that trial counsel made a strategic decision not to pursue such a motion and that therefore it was unnecessary to consider the validity of Walker's arrest.

The circuit court denied Walker's motion for post-conviction relief in its Decision and Order filed on October 14, 1988. In the Decision and Order, the circuit court first addressed Walker's claim that he was denied his constitutional right to effective assistance of counsel because trial counsel failed to make a *Batson* objection during the jury selection process. The circuit court found that, although trial counsel erred in not lodging a *Batson* objection, the error did not constitute deficient performance. The circuit court also found that, had the *Batson* objection been made, the objection would not have succeeded because there was no evidence that purposeful discrimination tainted the jury selection process. According to the circuit court, Walker had failed to make out a prima facie case of purposeful discrimination. The circuit court noted that the prosecutor was unable to remember that one of the venirepersons was black. The circuit court ruled that the fact that Walker was tried by an all-white jury did not deprive him of a fair trial and that the result of the trial is reliable.

The circuit court then turned to a discussion of whether Walker was denied his right to effective assistance of counsel because trial counsel failed to attempt to suppress the lineup and in-court identifications as the fruits of an unlawful arrest. The circuit court ruled that Walker was not denied his right to effective assistance of counsel in this regard. The circuit court found that trial counsel made a strategic decision not to move to suppress

the lineup identifications, noting that trial counsel skillfully attempted to impeach the trial testimony of those witnesses who made less than positive identifications at the lineup. Moreover, the circuit court ruled that a motion to suppress the identifications would not have succeeded because the warrantless arrest was not unlawful. In concluding that the arrest was lawful, the circuit court reasoned as follows:

> The defendant was arrested in yard [sic] outside of his home that was in plain view of police officers as they arrived. The "plain view" exception to the warrant requirement justified his seizure. The officers arriving at the home went there with extremely strong probable cause to believe that the defendant committed a felony; the defendant was in plain view; the discovery was inadvertent for these purposes, in that they had no way of knowing that he was going to be outside the home when they arrived; and if the defendant would not have come out of the house voluntarily, they could have surrounded the home and obtained a search or arrest warrant since they would have had probable cause for both. The court relies upon the cases of *Conrad v. State*, 63 Wis. 2d 616 (1974) and *Bies v. State*, 76 Wis. 2d 457 (1977).

This case is presently before this court on certification from the court of appeals pursuant to sec. (Rule) 809.61, Stats., and this court decided to consider all three issues raised on appeal.

I.

Walker's first contention is that he was denied his state and federal constitutional right to effective

assistance of counsel when the prosecutor used a peremptory challenge to exclude the only black venireperson from the petit jury without a *Batson* objection by his trial counsel.

In the alternative to the ineffective assistance of counsel claim, Walker, relying upon this court's decision in *State v. Cleveland*, 118 Wis. 2d 615, 348 N.W.2d 512 (1984), urges this court to address the validity of the prosecutor's peremptory challenge as though Walker's trial counsel had made the proper objection during the jury selection process. In *Cleveland*, it was argued by the State that the defendant had waived his right to present his Fourth Amendment claim by failing to bring the proper pretrial motion and by failing to make the proper objection at trial. The defendant, on the other hand, claimed that he was denied his constitutional right to effective assistance of counsel since his trial counsel's failure to bring the proper pretrial motion and to object at trial was due to trial counsel's inadequate knowledge of the relevant law. This court noted that, "[a]lthough objections which have been waived are not reviewable as a matter of right, this court may consider such objections if it chooses." *Id.* at 632. This court chose to address the Fourth Amendment claim on the merits even though trial counsel failed to preserve the claim. Because the defendant's claim was resolved in this fashion, this court did not reach the question of ineffective counsel. *Id.* at 632-33.

In this case, it is undisputed that Walker's trial counsel was not aware of the Supreme Court's landmark decision in *Batson*. It is also undisputed that at some point in the proceedings Walker told trial counsel that he thought that the prosecutor's peremptory challenge on

the black venireperson was illegal based on a newspaper article he had read about the *Batson* decision, yet counsel did not object. In its decision and order regarding Walker's post-conviction motion the circuit court found that Walker's trial counsel committed error by failing to bring to the court's attention Walker's concern over the striking of the black venireperson. Given these circumstances, we have decided, at our discretion, to undertake an analysis of Walker's *Batson* claim pursuant to *Cleveland* and therefore analyze the claim as though a timely objection had been made. Because we treat the *Batson* claim under the *Cleveland* approach, we do not reach the question of ineffective assistance of counsel.

Walker argues that he was denied his constitutional right to equal protection of law[4] when the prosecutor used a peremptory challenge to exclude the only black venireperson from the petit jury, relying on the decision of the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986). Our analysis of Walker's claim thus begins with the *Batson* decision, itself.

In *Batson*, the defendant, a black man, was charged with second-degree burglary and receipt of stolen goods. During the jury selection process at the defendant's trial, the prosecutor used peremptory challenges to exclude from the petit jury the only four black persons on the venire, leaving an all-white jury. In the United States Supreme Court, the defendant argued that the prosecutor's removal of every potential black juror violated his

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[4] The Fourteenth Amendment to the United States Constitution provides, in part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community and to an impartial jury. The Court decided that proper resolution of the defendant's challenge depended upon equal protection principles, as was argued by the state of Kentucky; therefore, the Court did not address the defendant's Sixth Amendment argument. *Batson*, 476 U.S. 82-83 & n.1.

The Court initially noted that in *Swain v. Alabama*, 380 U.S. 202 (1965), it recognized that the Equal Protection Clause is violated when the state intentionally excludes blacks from the petit jury on the basis of race. *Batson*, 476 U.S. at 84. The Court then noted that racial discrimination in the jury selection process harms three distinct groups. First, defendants are harmed when racial discrimination infects the jury selection process. Second, the rights of the excluded jurors are violated when they are denied the opportunity to serve as jurors on account of race. *Id.* at 86-87. Third, society is harmed by discriminatory jury selection procedures because such discriminatory procedures undermine public confidence in the fairness of our system of justice. *Id.* at 87.

Under *Swain*, in order for a black defendant to make out a prima facie showing that the state had used peremptory challenges in contravention of equal protection principles, the defendant was required to show that a prosecutor used such challenges in a racially discriminatory manner "in case after case . . . with the result that no Negroes ever serve on petit juries." *Swain*, 380 U.S. at 223. Thus, black defendants could not rely solely upon the facts of their particular cases alone to make out a prima

facie showing that prosecutors had used peremptory challenges in violation of the Equal Protection Clause.

The Court in *Batson* noted that the *Swain* evidentiary burden for making out a prima facie case had "placed on defendants a crippling burden of proof, [in effect immunizing] prosecutors' peremptory challenges . . . from constitutional scrutiny." *Batson*, 476 U.S. at 91-92. The Court rejected the *Swain* evidentiary burden for making out a prima facie equal protection violation, finding it inconsistent with the body of equal protection case law that had developed since the *Swain* decision. *Id.* at 93. The Court held that the equal protection cases decided since *Swain* provided support for the proposition that a defendant could establish a prima facie showing that the prosecutor had used peremptory challenges in a purposefully discriminatory manner by relying solely upon the facts of his or her case. *Id.* at 96.

After rejecting this portion of the *Swain* decision, the Court set forth what is required of a defendant in order to establish a prima facie case of purposeful discrimination with respect to the prosecutor's use of peremptory challenges:

> [T]he defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor

> used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Id. (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)) (citations omitted). With respect to the third element of the prima facie case, the Court provided two examples of "relevant circumstances" a trial court should consider. First, the Court noted that a "pattern" of strikes against venirepersons of the same race as the defendant might raise an inference of discrimination.[5] Second, the Court

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[5] In this case, the State, seizing upon the use of the "pattern" language by the Court in *Batson*, infers that a court is prevented from finding purposeful discrimination when a prosecutor peremptorily challenges only one black venireperson in a case where the defendant is black. We do not believe that the Court in *Batson* intended such a rule, for, as another court has noted, "the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown." *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986). A hard and fast rule that no prima facie case could be established when a prosecutor uses peremptory challenges to strike only one or two black venirepersons would be highly inappropriate in Wisconsin where many jurisdictions have a low black population: "Black defendants would more often than not be forced to forfeit their rights under *Batson* merely because of the statistical likelihood that their jury venires will be overwhelmingly non-black." *United States v. Clemons*, 843 F.2d 741, 748 n.6 (3d Cir.), *cert. denied*, 109 S. Ct. 97 (1988). In fact, in *Clemons*, the court noted that it is easier for a black defendant to establish a prima facie case when one or two blacks are excluded from the petit jury by the prosecutor's peremptory challenges in a jurisdiction with a low black population. *Id.* at 748.

stated that the prosecutor's questions and statements during voir dire might support an inference of discriminatory intent. *Id.* at 97.

The Court did not further elaborate upon what it meant by "all relevant circumstances." *Id.* at 96-97. However, other courts have considered the relevant circumstances trial judges should consider in assessing whether the defendant has established a prima facie case, finding the following factors significant:[6] whether the prosecution has eliminated all members of the defendant's race from the panel of prospective jurors;[7] whether the race of the defendant or his or her witnesses is different than the

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[6] We consider these factors to be illustrative, not exhaustive.

[7] Some courts have created a bright-line rule that when a prosecutor uses peremptory challenges to exclude all members of defendant's race from the petit jury, a prima facie case is automatically established, even if only one peremptory strike is needed to exclude all members of defendant's race. *See, e.g., Stanley v. State*, 313 Md. 50, 542 A.2d 1267 (1988); *Pearson v. State*, 514 So. 2d 374 (Fla. Dist. Ct. App. 1987); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987), *cert. denied*, 109 S. Ct. 534 (1989). We decline to adopt this bright-line rule, especially in light of the fact that in *Batson*, the Court did not adopt such a rule, even though all four black members of the panel of prospective jurors were eliminated by the prosecutor's peremptory challenges. Rather, the fact that all members of the defendant's race have been eliminated by the prosecutor's peremptory challenges, even if that means striking only one person, is merely a factor the trial judge should consider in deciding whether the defendant has established a prima facie case. *Clemons*, 843 F.2d at 748; Serr and Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim. L. & Criminology 1, 30 (1988)

(Continued on following page)

race of the victim or the state's witnesses;[8] whether the excluded jurors sharing the defendant's race responded to any questions of the judge or the lawyers in a manner that made them suitable candidates for exclusion by the prosecutor;[9] how many venirepersons share defendant's race; and the nature of the crime.[10]

According to *Batson*, if the trial judge finds that the defendant has established a prima facie case, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97. Although the Court recognized that this explanation "requirement imposes a limitation in some cases on the full peremptory character of the historic challenge", the Court emphasized "that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Id.* The prima facie case is not rebutted, the Court noted, when the prosecutor states that venirepersons were challenged on the ground that they would favor the defendant because they were of the same race as the defendant. *Id.*

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(hereinafter "Serr and Maney"). We agree with the conclusion of the Third Circuit Court of Appeals in *Clemons* that, "[a]lthough it may be easier to establish a prima facie case when all blacks are excluded from a jury, . . . we cannot say the conclusion is automatic. *Clemons*, 843 F.2d at 748.

[8] *See, e.g., Stanley*, 542 A.2d at 1278; *Clemons*, 843 F.2d at 748; *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792, 795 (1987); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, 295, *cert. denied*, 484 U.S. 918 (1987).

[9] *See, e.g., Stanley*, 542 A.2d at 1278; *People v. Scott*, 70 N.Y.2d 420, 516 N.E.2d 1208, 1211 (1987).

[10] *See, e.g., Clemons*, 843 F.2d at 748.

The Court in *Batson* also stated that the prosecutor's explanation must be clear and reasonably specific. *Id.* at 98 n.20. This requirement that the explanation be clear and reasonably specific is not satisfied by the prosecutor's mere denial of intent to discriminate or the prosecutor's mere affirmance of a good faith intent. *Id.* at 98. *See also Chalan*, 812 F.2d at 1314 (Concluding that the following explanation did not satisfy the "clear and reasonably specific" requirement: "based upon his background and other things in his questionnaire, I just elected to strike him.").

In addition to being neutral and clear and reasonably specific, the explanation must be "related to the particular case to be tried." *Batson*, 476 U.S. at 98. The New Jersey Supreme Court determined that the prosecutor's explanation was unrelated to the case to be tried in *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (1986), where the issue was whether a prosecutor's use of peremptory challenges violated the New Jersey Constitution. The court concluded that one of the prosecutor's explanations for striking blacks – that he wanted jurors of "high intellectual achievement" – was unrelated to the case to be tried because the case involved only the simple issue of whether the defendant could be identified as the perpetrator. *Id.* at 1168.

Once the defendant has established a prima facie case and the prosecutor has come forward with an explanation that is neutral, clear and reasonably specific, and related to the case to be tried,[11] the trial court must determine

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[11] Of course, the defendant may show that the prosecutor's explanation for the peremptory challenge is in fact pretext for racial discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

whether the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 98. The defendant has the ultimate burden of persuasion with respect to the issue of purposeful discrimination. *Id.* at 94 n.18.[12]

We now apply these principles to the circuit court's decision in the case at hand. The circuit court concluded that Walker had failed to establish a prima facie case. In reaching this conclusion, the circuit court found the following factors significant: no pattern of strikes against potential jurors of Walker's race had been shown because the prosecutor challenged only one such juror; the prosecutor was not known by the trial judge for customarily eliminating blacks from the jury panel with peremptory challenges; and the prosecutor's questions during voir dire did not support an inference of discriminatory purpose.

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[12] Upon a timely objection, if the defendant establishes a *Batson* violation, the proper remedy is either "to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire." *Batson*, 476 U.S. at 99-100 n.24 (citations omitted). One factor the trial court should consider in selecting the appropriate remedy is whether the challenged juror is aware of the fact that he or she was challenged by the prosecutor. If the challenged juror is aware of the fact that he or she was challenged by the prosecutor, then that juror should not be reinstated because there is a substantial likelihood that he or she will have developed a bias against the prosecutor. Serr and Maney at 61 n.322.

We conclude that the circuit court erred in determining that Walker failed to establish a prima facie case.[13] Our review of the record shows that Walker is black, that only one of the venirepersons at Walker's trial was black, that the prosecutor used a peremptory challenge to exclude this sole black venireperson from the petit jury, and that Walker's counsel would not have used a peremptory challenge to strike this venireperson. The circuit court noted that blacks account for less than three percent of the population of Kenosha County and that the prosecutor in this case is not known for customarily striking blacks from the venire. The record also shows that this black venireperson did not answer in a way that would suggest a disqualifying attitude to any general questions directed at the pool of jurors by the judge or by the lawyers, nor did the court or counsel ask the black venireperson any specific questions. The record further indicates that every prosecution witness was white while all alibi witnesses for the defense were black. Finally, the prosecutor admitted that he struck the black venireperson because he knew nothing about him. These facts raise an inference of purposeful discrimination.

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[13] In this case, we need not decide whether the circuit court's finding that Walker failed to put forth facts raising an inference of discrimination is a finding subject to a de novo or a clearly erroneous standard of review. *Compare Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531 (9th Cir. 1982), *with* Serr and Maney, at 38-39. Even under that standard of review according the greatest deference to the circuit court, we conclude that it was error to find that no prima facie case had been established.

Because we conclude that Walker has made a prima facie showing of purposeful discrimination, the burden shifts to the prosecution to explain its actions. In its decision regarding Walker's post-conviction motion, the circuit court did not mention the prosecutor's explanations, apparently because the circuit court found that Walker failed to make out a prima facie case. Our review of the record shows that the prosecutor provided two explanations for using a peremptory challenge to strike the sole black venireperson. First, the prosecutor denied that he had a discriminatory motive. The Court in *Batson* declared that the mere denial of discriminatory intent is not sufficient to rebut an inference of purposeful discrimination. *Batson*, 476 U.S. at 98. Second, the prosecutor explained that, going into the jury selection process for Walker's trial, he only had information about jurors with juror numbers between 841 and 906. The black venireperson had a juror number of 944. The prosecutor thus stated that he struck the black venireperson because he had no information about him. This explanation is unacceptable because it is not "clear and reasonably specific." Moreover, this explanation appears to be pretextual. Of the prosecutor's four peremptory challenges, only one other was used to strike a potential juror with a juror number greater than 906, and seven potential jurors with numbers higher than 906 ultimately served on the jury.

We conclude that the circumstances surrounding the jury selection process at Walker's trial support an inference of purposeful discrimination and that the prosecutor did not adequately explain the racial exclusion. Because the record in this case shows an unrebutted prima facie

case of purposeful discrimination, Walker's conviction must be reversed. *Batson*, 476 U.S. at 100.

II.

Walker's second contention is that he was denied his constitutional right to effective assistance of counsel because his trial counsel failed to move to suppress both lineup and in-court identifications of Walker as the fruit of an unlawful arrest. Because we have already decided that Walker is entitled to a new trial, it is unnecessary to determine whether Walker's trial counsel was ineffective for failing to make such a motion. Rather, we need to decide only whether Walker's arrest was unlawful, and, if so, whether the identification evidence is the fruit of the unlawful arrest. The first question we address is whether Walker's arrest was unlawful. The only significant references in the record to Walker's arrest are found in the transcript of the hearing held on Walker's motion for post-conviction relief. At this hearing, Walker provided the following testimony on direct examination regarding the circumstances surrounding his arrest:

Q. Mr. Walker, do you recall when you were originally arrested in this case?

A. Yes, I do.

Q. When was that?

A. It was September 4, 1986.

Q. Do you recall where you were at the time of the arrest?

A. I was at my home, my backyard.

Q. Is there a fence around your backyard?

A. Yes, there is.

Q. I'm sorry. Did you say what time it was that you were arrested?

A. It was approximately 9:15. Between 9:15, I think – between 9:00 and 9:30 in the p.m.

Q. p.m.

A. p.m., exactly.

Q. Did any of the arresting officers ever show you a warrant?

A. No.

On cross-examination, Walker further testified about his arrest as follows:

Q. Mr. Walker, relative to your arrest for a moment, you were told the reasons why you were arrested, weren't you?

A. No, I was not.

Q. You were just taken into custody –

A. Yes.

Q. – by the police on September 4th?

A. On September 4th, right.

Q. Do you remember what time on September 4th?

A. Approximately 9:00, 9:30 p.m.

Q. p.m. or a.m.?

A. p.m.

Q. So it was dark out?

A. Yes, it was.

Q. You recall what you were doing in the back-yard?

A. I was bedding my dog down.

Q. Okay. You were not in the house itself?

A. No, I wasn't.

Q. Okay. You were arrested by police officers in uniform?

A. I was arrested by plainclothed detectives and police officers in uniform.

. . . .

Q. You were never told of any reasons why you were arrested then?

[DEFENSE COUNSEL]: Objection, asked and answered.

THE COURT: It has been. . . . My question, sir, is how did they get there. Did they come through an alley or around the side of the house? How'd they get there.

THE WITNESS: They came from – They came in through up in the driveway into the backyard into the house. There were police at the door, the front door of the house, from what I understand, and there were police on the side of the house pointing at the window. Obviously, they thought I was in the house.

THE COURT: I see.

THE WITNESS: And I was in the backyard on the side of the garage with my dog, bedding my dog down for the evening. I had been jogging and I just came back

> from jogging. I bedded my dog down, when I heard – I heard a noise and I turned and the police – plainclothed detective was standing there, and he said, "Don't move, brother, or I'll blow your head off." That's when I was arrested.

THE COURT: And you were still in the backyard?

THE WITNESS: I was in the backyard.

THE COURT: Where did the officer come from?

THE WITNESS: From the driveway.

THE COURT: I see. All right.

The District Attorney offered no evidence at this hearing concerning Walker's arrest. The record thus shows that, at the time of Walker's warrantless nighttime arrest, Walker was in the fenced-in backyard of his home.

In deciding whether Walker's arrest was lawful, we begin by examining the nature of the protection that the Fourth Amendment provides to the home and the land next to the home.[14] In *Payton v. New York*, 445 U.S. 573 (1980), the United States Supreme Court held that the Fourth Amendment, made applicable to the states by the Fourteenth Amendment, prohibits police from making a warrantless and nonconsensual entry into a felony

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[14] The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, homes, papers, and effects" to be free from unreasonable searches and seizures.

suspect's home to arrest the suspect, absent probable cause and exigent circumstances. The Court has also determined that the Fourth Amendment protections that attach to the home likewise attach to the curtilage, which is defined generally as "the land immediately surrounding and associated with the home." *Oliver v. United States*, 466 U.S. 170, 180 (1984). In *Oliver*, the Court reasoned that the curtilage receives the Fourth Amendment protections that attach to the home because, "[a]t common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' " *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

Read together, *Payton* and *Oliver* require that police obtain a warrant before entering either the home or its curtilage to make an arrest absent probable cause and exigent circumstances. Under *Payton* and *Oliver*, therefore, absent probable cause and exigent circumstances, Walker's warrantless arrest, although not occurring in his home, was unlawful if his fenced-in backyard falls within the curtilage of his home.

In *Oliver*, the Court stated that the reach of a home's curtilage was in general determined "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." *Oliver*, 466 U.S. at 180.[15] The

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[15] That the Court in *Oliver* treated the home and the curtilage the same for Fourth Amendment purposes is entirely consistent with the Court's landmark decision in *Katz v. United States*, 389 U.S. 347 (1967). Under *Katz*, in order for an area to

(Continued on following page)

Court explicitly stated the factors relevant to defining the extent of a particular home's curtilage in *United States v. Dunn*, 480 U.S. 294, 301 (1987):

> the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

According to the Court in *Dunn*, these factors help focus the inquiry on the proper question; namely, "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.* Applying these factors to the case at hand, it is obvious that Walker's fenced-in backyard falls within the curtilage of his home.

Because Walker was arrested within the curtilage of his home without a warrant, his arrest was unlawful in the absence of probable cause and exigent circumstances. Assuming that probable cause to arrest existed, the prosecutor did not, at the post-conviction motion hearing, offer proof with respect to exigent circumstances, although the prosecutor was given the opportunity to do so. The prosecutor had the burden of proof to show

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(Continued from previous page)

receive Fourth Amendment protection, a person must have a "reasonable expectation of privacy [in that area]." *Id.* at 360 (Harlan, J., concurring). The above-quoted passage from *Oliver* shows that the curtilage is such an area that a person reasonably may expect will remain private.

exigent circumstances. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984).[16]

Since we have concluded that Walker's arrest was unlawful, we must now determine whether the lineup and the in-court identifications of Walker by the witnesses are the forbidden fruit of the unlawful arrest.

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[16] Walker's arrest is not valid under *United States v. Santana*, 427 U.S. 38 (1976), as argued by the State. In *Santana*, the officers first attempted to arrest Santana after they found her standing on the threshold of her house. As she was standing on the threshold, Santana spotted the officers coming for her and took refuge inside her house, where the arrest was made. The threshold of one's house is a place; although on private property, that is used by various members of the public and is visible to any person that passes by the house. A fenced-in backyard, on the other hand, is not an area accessible to the public, and one is normally not visible to those passing by the front of the house. *See State v. Parker*, 399 So. 2d 24, 28 (Fla. Dist. Ct. App. 1981) (enclosed backyard is zone of privacy for Fourth Amendment purposes, and the backyard is more private than the front yard because the backyard cannot be seen by those passing by the front of the house). The hot pursuit doctrine justified the in-home arrest in Santana.

Moreover, the circuit court erred in determining that Walker's arrest was justified under the plain view exception to the warrant requirement. Assuming that the plain view exception applies to the seizure of persons, it is clear that the "plain view *alone* is never enough to justify [a Fourth Amendment seizure]. . . . " *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971) (emphasis in original). That plain view alone can never justify a warrantless seizure, the Court in Coolidge went on to state, "is simply a corollary of the familiar principle . . . that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' " *Id.* Even if Walker became visible to police as they attempted to surround his house, no circumstances have been shown that justify his seizure as he occupied a protected area.

Wong Sun v. United States, 371 U.S. 471 (1963); *United States v. Crews*, 445 U.S. 463 (1980). There is language in our prior opinions stating that a lineup identification may not be suppressed on the ground that it is the fruit of an illegal arrest. *See, e.g., Schaffer v. State*, 75 Wis. 2d 673, 679-80, 250 N.W.2d 326 (1977) (quoting *State v. Brown*, 50 Wis. 2d 565, 570, 185 N.W.2d 323 (1971)). In a more recent case, *State v. Cheers*, 102 Wis. 2d 367, 306 N.W.2d 676 (1981), this court was confronted with the issue of whether out-of-court and in-court identifications had to be suppressed as the fruit of an allegedly unlawful arrest. In *Cheers*, this court found the arrest to be lawful and therefore was not required to reach the issue of suppression of the identification evidence. However, in the case at hand, we are required to reach the issue of whether the identification evidence should be suppressed because we have found that the arrest was unlawful. In light of *Crews* and *Wong Sun*, we overrule *Brown* and *Schaffer* insofar as they hold that lineup identification evidence may not be suppressed as the fruit of an unlawful arrest.

The primary question in cases such as this one where it is claimed that evidence is the forbidden fruit of an unlawful government act was stated by the Court in *Wong Sun*:

> the . . . apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Wong Sun, 371 U.S. at 488 (quoting Maguire, *Evidence of Guilt*, 221 (1959)). The State has the burden to prove that

the identification evidence in question is admissible once the defendant has established the "primary illegality." *See Brown v. Illinois*, 422 U.S. 590, 604 (1975).

We turn first to the question of whether the lineup identification evidence is the fruit of the unlawful arrest. The line-up, itself, was held on September 5, 1986, at 9:30 a.m., approximately twelve hours after Walker's arrest. Five eyewitnesses to the armed robberies, all of whom testified at Walker's trial, viewed the lineup. In determining whether lineup identification evidence from these witnesses should have been admitted at trial, we agree with the suggestion of one commentator that the analysis is the same as the analysis undertaken by the United States Supreme Court in *Brown*, where the question was whether a confession was the fruit of an unlawful arrest. 4 I aFave, *Search and Seizure*, sec. 11.4(g), at 433 (hereinafter "LaFave"). In *Brown*, the Court identified three factors relevant to such inquiries:

> the temporal proximity of the arrest and the [lineup], the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. . . .

Brown, 422 U.S. at 603-04 (citations omitted).

The first *Brown* factor – the temporal proximity of the arrest in the lineup – is significant only in the sense that it may reveal the purpose of the arrest (factor three). 4 LaFave, sec. 11.4(g) at 434-35. The second factor is the presence or absence of intervening circumstances. Bringing the defendant before a committing magistrate to advise the defendant of his or her rights and to set bail has been deemed a sufficient intervening circumstance to

cleanse the lineup of any taint stemming from an unlawful arrest. *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972).[17] With respect to the third factor, the fact that the arrest was not flagrant and was not for the purpose of putting the defendant before a lineup is not enough alone to validate the lineup. Rather, the absence of this factor merely means that less is required in terms of intervening circumstances. 4 LaFave, sec. 11.4(g), at 434, 435.

Because the record in this case does not permit us to apply these factors to the case at hand, this issue must be resolved on remand. The record shows that a parole hold was placed on Walker the day of the lineup, September 5, 1986, but there is no showing in the record as to the precise time that the hold went into affect. A parole hold would be relevant to the "intervening circumstances" factor of the *Brown* test.

Again, the burden of proof on the question of admissibility is on the prosecution, and this matter is to be resolved at a hearing prior to the trial.

We next turn to the admissibility of the in-court identifications of Walker. If on remand the circuit court determines that the lineup identification evidence is the fruit of the unlawful arrest, the circuit court must then determine whether the in-court identification by any witness who viewed Walker in the lineup must also be excluded as the fruit of the unlawful arrest. *See United States v. Crews*, 445 U.S. 463 (1980). In determining

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[17] For addition examples of "intervening circumstances" that have been deemed sufficient by other courts, see 4 LaFave, sec. 11.4(g), at 434.

whether an in-court identification is the fruit of an unlawful arrest, the primary question is whether the lineup identification, suppressed and the fruit of an unlawful arrest, has affected the reliability of the in-court identification, making it inadmissible as well. A particular witness's in-court identification is admissible if the court finds it "rest[s] on an independent recollection of [the] initial encounter with [the perpetrator], uninfluenced by the [lineup] identification[]. . . . *Id.* at 473. The factors relevant to this inquiry are as follows:

> the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts . . . concerning the conduct of the lineup.

United States v. Wade, 388 U.S. 218, 241 (1967) (footnote omitted).[18]

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[18] In *Wade*, the issue before the Court was "whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel." *Wade*, 388 U.S. at 219-20. Although the issue in *Wade* is slightly different than the issue presented in this case, the above *Wade* factors were found instructive by the Court in *Crews* in resolving the exact issue presented here; namely, whether the pretrial identifications, which could be suppressible as the fruit of an unlawful arrest, have affected the reliability of any in-court identification. *Crews*, 445 U.S. at 473 n.18.

As has been stated, if on remand the circuit court finds that the lineup identification evidence is the fruit of the unlawful arrest, the circuit court must then determine whether, in light of the factors mentioned in Wade, any in-court identification must also be suppressed as the fruit of the unlawful arrest. The issue of whether any in-court identification of the accused must be suppressed should be resolved at a *Goodchild*[19] hearing, and the burden is on the State to establish by clear and convincing evidence that the particular in-court identification is untainted. *See Brown*, 50 Wis. 2d at 572, 573.

III.

The third issue this court addresses is whether the circuit court erred when it prevented the jury from hearing evidence about a crime that occurred while Walker was incarcerated, a crime that Walker alleges was similar to those for which he was on trial. Walker's offer of proof revealed that at approximately 11:00 p.m. on September 26, 1986, a light-skinned black male with liver spots entered the Koretz Tavern in the City of Kenosha and told the bartender that he wanted the money from the cash register.[20] The man spoke quietly and held his right hand inside his jacket, creating the appearance that he had a gun. After receiving the money, he departed on foot.

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[19] *State ex rel Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), *cert. denied*, 384 U.S. 1017 (1966).

[20] The man was also described as having a well-trimmed beard and mustache.

Although the circuit court excluded evidence with respect to this crime, the jury was allowed to hear evidence with respect to two other allegedly similar armed robberies that occurred while Walker was incarcerated.

Walker attempted to have the evidence about the Koretz Tavern robbery admitted on the theory that such evidence was relevant to the issue of Walker's guilt; evidence of crimes similar to those for which Walker was standing trial that occurred while Walker was incarcerated could create doubt on the issue of guilt. The circuit court excluded the evidence about the Koretz robbery as irrelevant.[21] The circuit court found that the description of the perpetrator of the Koretz Tavern robbery as a light-skinned black male with liver spots did not match any description of the perpetrator in the cases for which Walker was on trial; therefore, the perpetrator of the Koretz robbery could not have been the perpetrator of any of the crimes for which Walker was on trial. In this court, Walker argues that the circuit court's exclusion of the Koretz robbery evidence violated his constitutional right to present a defense, relying primarily upon the court of appeals decision in *State v. Johnson*, 118 Wis. 2d 472, 348 N.W.2d 196 (Ct. App. 1984).

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[21] The definition of "relevant evidence," which is set forth in sec. 904.01, Stats., is as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The principles that govern a review of the circuit court's determination on the issue of relevancy are clear. An appellate court must uphold a trial court's determination on an issue of relevancy unless the determination constitutes an abuse of discretion. *State v. Pharr*, 115 Wis. 2d 334, 345, 340 N.W.2d 498 (1983). In *Hartung v. Hartung*, 102 Wis. 2d 58, 306 N.W.2d 16 (1981), this court stated the method for reviewing a trial court's discretionary determination:

> A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

Id. at 66.

As previously stated, the circuit court excluded evidence about the Koretz Tavern robbery, deeming it irrelevant because of the dissimilarity in appearance between the perpetrator of that crime and the perpetrator of any of the crimes for which Walker had been charged. The circuit court made the determination based on the facts of the case, the relevant law, and a process of logical reasoning, and the determination is one that a reasonable court

could make. Thus, it was not an abuse of discretion for the circuit court to exclude as irrelevant evidence about the Koretz Tavern robbery. Because the evidence is irrelevant, the exclusion of the evidence did not violate Walker's constitutional right to present a defense since "a defendant has no right, constitutional or otherwise, to present irrelevant evidence." *State v. Robinson*, 146 Wis. 2d 315, 332, 431 N.W.2d 165 (1988).[22]

In summary, we conclude that Walker established a prima facie case of purposeful discrimination in the selection of the petit jury and that the prosecution failed to rebut the prima facie case. Walker's conviction, therefore, must be reversed, and he is entitled to a new trial. We further conclude that Walker's warrantless nighttime arrest in his fenced-in backyard violated the Fourth Amendment to the United States Constitution. On remand, prior to Walker's new trial, the circuit court must conduct a hearing to determine whether, in light of the guidelines set forth in this opinion, the lineup identification evidence must be suppressed as the fruit of Walker's unlawful arrest. If the circuit court finds that the lineup evidence is the fruit of Walker's unlawful arrest, then the court must determine whether, in light of the

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[22] *State v. Johnson*, a court of appeals decision upon which Walker relies, does not compel a contrary result. In *Johnson*, the court of appeals noted that, absent a "substantial" or "compelling" state interest, keeping crucial and *relevant* evidence from the jury violated the accused's due process rights. *Johnson*, 118 Wis. 2d at 479. Here, in contrast, the circuit court found the evidence to be irrelevant.

guidelines set forth in this opinion, any lineup identification has affected the reliability of any in-court identification, thus rendering it inadmissible as well. We finally conclude that the circuit court's decision to exclude defense evidence about a crime that occurred while Walker was incarcerated did not constitute an abuse of discretion.

By the Court. The judgment and order of the circuit court are reversed.

No. 88-2058-CR

STATE OF WISCONSIN IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LIONEL D. WALKER,

Defendant-Appellant.

LOUIS J. CECI, J. (*Dissenting.*) On this appeal, Walker argues that he was denied his state and federal constitutional rights to effective assistance of counsel during his criminal trial. Walker claims that his trial counsel was ineffective when he failed to make an objection, pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), during jury selection and when he failed to move to suppress lineup and in-court identifications of Walker as the fruit of an unlawful arrest. The majority, relying on *State v. Cleveland*, 118 Wis. 2d 615, 348 N.W.2d 512 (1984), undertakes a discretionary review of the merits of the alleged *Batson* violation and avoids the issue of ineffective assistance of counsel. The majority then concludes that because Walker is entitled to a new trial pursuant to *Batson*, it need not decide whether he was denied effective assistance when counsel failed to move to suppress the lineup and in-court identifications. I disagree with the approach taken by the majority and would analyze Walker's contentions under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), for claims of ineffective assistance of counsel.

A claim of ineffective assistance brought pursuant to the sixth amendment to the United States Constitution must meet the test articulated by the United States Supreme Court in *Strickland*. *State v. Moffett*, 147 Wis. 2d 343, 352, 433 N.W.2d 572 (1989). Under that test, the defendant must prove not only that his counsel's performance was deficient but also that the deficient performance prejudiced the defense. *Id.* Where, as here, the alleged ineffectiveness relates to counsel's failure to raise a claim on the defendant's behalf, the defendant must prove that he was prejudiced by the omission by showing that the claim was meritorious and that there is a reasonable probability that, but for the omission, the result of the proceeding would have been different. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

Walker's first claim of ineffective assistance relates to counsel's failure to make a *Batson* objection during jury selection. In deciding *Batson*, the United States Supreme Court contemplated that a minority defendant would object to the prosecutor's allegedly discriminatory use of peremptory challenges before members of the venire are dismissed and before the jury is impaneled. *Batson*, 476 U.S. at 99-100 n. 24. *See also* Serr and Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim. L. & Criminology 1, 18-19 (1988). A *timely Batson* objection ensures that the circuit court is able to contemporaneously review the prosecutor's reasons for striking members of the defendant's race and to easily cure any racial discrimination in the jury selection process *before* trial. *Id.* at 18.

The majority observes, at p. 18 n. 12, that *Batson* requires a *timely* objection. However, the majority ignores

this requirement and reviews the merits of Walker's *Batson* claim as if it were timely raised.[1] In the instant case, Walker did not object to the prosecutor's use of a peremptory challenge as discriminatory until more than eighteen months after the selection of his jury and the commencement of his criminal trial. As a result of the delay, the prosecutor had difficulty remembering the reasons for his use of a peremptory challenge to strike the only black person on the petit jury during jury selection. Where the defendant does not object to the prosecutor's use of a peremptory challenge in a timely fashion, I do not believe that the benefit of enforcing *Batson* by vacating convictions is warranted absent some affirmative showing that the defendant was deprived of a trial before a fair and impartial jury or that the result of the trial was unreliable.

I therefore believe that Walker's claim of ineffective assistance must fail on the prejudice prong of the *Strickland* analysis. At the post-conviction hearing, Walker made absolutely no showing that he had been deprived of a trial before a fair and impartial jury or that the result

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[1] In a number of cases cited in the majority opinion, a timely *Batson* objection was made. *See Stanley v. State*, 313 Md. 50, 542 A.2d 1267 (1988); *United States v. Clemons*, 843 F.2d 741 (3d Cir. 1988); *People v. Scott*, 70 N.Y.2d 420, 516 N.E.2d 1208 (1987); *Pearson v. State*, 514 So. 2d 374 (Fla. Dist. Ct. App. 1987); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987); *United States v. David*, 803 F.2d 1567 (11th Cir. 1986); *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (1986). Where, as here, a *Batson* objection is not raised in a timely fashion, I cannot agree with the majority that a *Cleveland* review of the merits of the *Batson* claim is warranted. I believe that the proper approach is to review such a case under the prejudice analysis of *Strickland*.

of his trial was unreliable. Accordingly, I would hold that Walker failed to establish that there is a reasonable probability that, but for counsel's omission, the result of his trial would have been different. If a court is able to dispose of a claim of ineffective assistance on the ground of insufficient prejudice, it need not determine whether counsel's performance was also deficient. *Strickland*, 466 U.S. at 697.

Walker's second claim of ineffective assistance relates to his counsel's failure to move to suppress lineup and in-court identifications of Walker as the fruit of an unlawful arrest. I believe that additional fact-finding must be performed on the merits of the motion to suppress before an analysis of Walker's claim of ineffective assistance may be undertaken. I would, therefore, remand the case to the circuit court for additional fact-finding on that issue.

For the reasons stated, I dissent. I am authorized to state that Justice Roland B. Day joins in this dissenting opinion.

STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

-v-

LIONEL D. WALKER,

Defendant.

DECISION & ORDER

File 86-CF-327

The defendant appeared in person and with Assistant State Public Defender Charles Bennett Vetzner and the plaintiff appeared by District Attorney Robert Zapf at the hearing held in this court on September 29, 1988, on the motion of the defendant for post-conviction relief. The court after careful consideration of the record, testimony presented, arguments of counsel and controlling law enters the following as its

DECISION

The defendant moves the court for post-conviction relief, pursuant to Rule 809.30(2)(h), from the judgment of conviction entered on January 28, 1987, for reason that the defendant was deprived of his state and federal constitutional right to effective assistance of counsel.

The defendant claims that his trial counsel did not make a *Batson v. Kentucky* type motion during the jury selection process. After hearing the court is satisfied that the defendant and his counsel thought one of the jurors on the panel of twenty was of the black race. The court is also satisfied that the District Attorney made no note of any juror being of the black race and that the prosecutor

has no recollection of any juror being black. The defendant's counsel confesses that at the time of the selection of the jury on December 15, 1986, he was unaware of the holding of *Batson v. Kentucky*, 476 U.S. 79 (1986). The court has during the hearing in this matter questioned as to when the published decision in the *Batson* case would have been made available to attorneys in this area. There has been no answer and the court cannot make a finding in that regard.

The court does not believe that it can hold a hearing now and determine "all possible explanatory factors" as required by the decision. The court can and does find that there is no evidence presented that would indicate that the minority of which the defendant is one, a person of the black race, was purposefully discriminated against in selection of the venire. The defendant argues that there was only one such minority of the twenty called to the box and the striking of that juror, as was done by the prosecutor here, makes a prima facie showing of purposeful discrimination. Counsel for the defendant argues that this is enough under *Batson*. It has been noted in the hearing that the black population in Kenosha County as of the 1980 census was approximately 2,886 which is less than 3% of the 123,137 which is the entire population of the county. There appears nothing more on the record or in the memories of anyone which would add or detract from a finding of purposeful discrimination on the part of the prosecutor.

The defendant argues that this situation now requires a finding of ineffective assistance of counsel. The court

strongly presumes that the trial attorney rendered adequate assistance of counsel and made all significant decisions in the exercise of reasonable professional judgment.

The court does not find that the representation of trial counsel fell below an objective standard of reasonableness. Certainly, the ideal situation is to have all attorneys read decisions of courts of record that are controlling in their jurisdiction immediately upon their availability. Experience tells a trial judge that this does not happen. It is obvious from the record that defense counsel was aware of the displeasure of client with the composition of the venire, much less the final jury.

In determining if there has been purposeful discrimination, the court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The test is whether the defendant shows the totality of the relevant facts gives rise to an inference of discriminatory purpose. Once the requisite showing has been made, the burden shifts to the state to explain adequately the racial exclusion.

There is absolutely no showing to establish a prima facie case of purposeful discrimination in selection of the venire. Based upon the small black population in Kenosha County, one would not expect a black juror to be among twenty that are summoned to serve.

The court finds that the defendant has demonstrated that he is a member of a cognizable racial group. In *Batson* the first step also requires "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." The plural rather than the singular is used. Certainly, with the

removal of more than one person of the racial group of which the defendant is one gives rise to a stronger inference that such strike is for racial purposes rather than for a permissible purpose or purposes. This court will not find that the law requires more than one peremptory challenge of a juror of the same minority race as that of the defendant. Rather, that the inference is stronger as the greater number of jurors of the same minority race are challenged.

The second step of the *Batson* test recognizes that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." This opportunity alone should cause this state to act and not allow peremptory challenges in criminal cases. Our society not only should be sensitive to purposeful discrimination, but should take affirmative steps to prevent it in our search for justice. To further note that the voir dire portion of a jury trial is by far the most expensive or that we should not inconvenience our citizens with the jury service summons only to strike them for any reason less than cause, only belabors the point.

The third step of the *Batson* test requires the defendant to show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

There is no pattern here of strikes against black jurors. Only one black juror struck from twenty jurors were the defendant was black. The Supreme Court in the *Batson* decision then stated "We have confidence that trial

judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against the black jurors." The prosecutor in this case was not and is not known by the court to strike black jurors customarily from juries. The questioning by counsel during the voir dire does not indicate to the court that the prosecutor was in any way attempting to generate prejudice towards the defendant because of race.

Due to the passage of time the prosecutor is unable to remember even if one of the jurors was black and his notes make no mention of any thing concerning the juror in question.

This court finds that the attorney for the defendant made an error in not bringing to the court's attention the defendant's concern over the striking of a juror that the defendant believed was of the same minority as he. Based upon the record, I cannot find that such error was so grievous so as to constitute deficient performance on the part of counsel.

The *Batson* decision does not set out the mechanism that should be utilized by trial judges after a peremptory challenge to a juror of the same race as that of the defendant is made. This court has in another case refused the prosecutor the strike and reinstated the juror. Trial judges in other states are requiring the prosecutor to make a written explanation if they strike a juror of the same minority race as that of the defendant. Some guidance in this area by an appellate court in this state would be helpful to all in the parties and the trial judge.

The court does not find that the error of the defense attorney prejudiced the defense. The court does not find that all white juries in this county are biased against black defendants. The vast majority of juries are all white in their composition. This is a reflection of the population from which they are drawn. This court also does not find that a black juror is going to side with a defendant because of the juror's race. Without scientifically researching the racial composition of juries in this county, this court can recall an all white jury finding a black defendant not guilty of an alleged first degree murder even after three confessions of the defendant were placed into evidence. The court also recalls that in a recent case the only black juror was the foreperson of the jury that found a black man guilty where a verdict in the case would not have been easy for any jury to reach.

There has been no showing that the error of the defense attorney was so serious as to deprive the defendant of a fair trial. This court believes that the result would be the same if the jury was all black or all white or a mixture of races. This court is confident that the result of the trial is reliable. Therefore, the defendant as to this point has not shown ineffective assistance of counsel.

The defendant also alleges that the trial counsel was ineffective because he did not bring a motion to suppress the out of court identifications of the defendant based upon an illegal arrest. First, the court finds that the defendant did bring a motion to dismiss the charge based upon an illegal arrest and that this motion was denied without an evidentiary hearing. Secondly, this court finds that the trial attorney skillfully utilized the out of court

identifications to impeach witnesses whose identifications were less than positive. This obviously was a strategy that was utilized by the defense. Finally, the court finds that the motion would not have been successful. The defendant was arrested in yard outside of his home that was in plain view of police officers as they arrived. The "plain view" exception to the warrant requirement justified his seizure. The officers arriving at the home went there with extremely strong probable cause to believe that the defendant committed a felony; the defendant was in plain view; the discovery was inadvertent for these purposes, in that they had no way of knowing that he was going to be outside the house when they arrived; and if the defendant would not have come out of the home voluntarily, they could have surrounded the home and obtained a search or arrest warrant since they would have had probable cause for both. The court relies upon the cases of *Conrad v. State*, 63 Wis. 2d 616 (1974) and *Bies v. State*, 76 Wis. 2d 457 (1977).

The court, as to this alleged error of the defense counsel, finds there was no error at all.

For all the above reasons the plaintiff is entitled to an order denying the defendant's motion.

The prosecutor claims that the motion is not timely. The court finds that it was timely made taking the statements of the defendant's counsel as true.

ORDER

Based upon the above decision;

IT IS HEREBY ORDERED that the motion of the defendant for post-conviction relief be and hereby is *denied*.

Dated this 14th day of October, 1988.

BY THE COURT
JEROLD W. BREITENBACH
Circuit Judge

EXCERPT FROM TRANSCRIPT OF POSTCONVICTION MOTION HEARING
(Page 117, line 12 to Page 123, line 9)

MR. ZAPF [district attorney]: Judge, the problem is that if the Court feels that defense has made its threshold showing of a prima facie case, then the burden shifts to the state on the question of the *Batson*, and I would – I feel at this time that, as I've indicated, defense counsel hasn't met its burden of proof in terms of a prima facie showing either on equal protection grounds or for the Court to entertain –

THE COURT: See, my question, Mr. Zapf, is if you want to present – if you were ready to present something here today, then fine. I'm not so sure as to what the law has – and I want to take a look at what the law in *Batson* has generated in recent times around the country, because I'm not so sure as to what specifically that has been or what has been the holding. So I'm not sure as to what the law is right at this time as to the – even as to the legal arguments, at least, and I just wanted to know if you wanted to offer any other evidence or put anything in the record at this time in addition to what's been given now?

MR. ZAPF: I do, judge.

THE COURT: The way I decide, I suppose, you may want to change it.

MR. ZAPF: Okay. In terms of the Court's review of this, then again I would want the record to reflect that I feel that the defense has not met their burden and that would be the end of it, but notwithstanding that, I think the Court is entitled to, at least, an explanation, not so much in terms of argument, but in terms of presentation

of it on the *Batson* issue, and what I would like to submit to the Court is a brief statement, two documents, that will support my statement.

THE COURT: And assuming that this case might be appealed by – depending upon my decision by anybody, that I think the benefit – And the Court of Appeals or Supreme Court of this state should make some kind of policy in terms of proecedure when such a *Batson* motion is made at the time of the voir dire and that it should be that if there is a challenge, that the objection is of a prosecutor or the rationale for the prosecutor for striking someone should be reduced to writing at that time. So I think that's a practice now that's being followed around the country in a number of jurisdictions.

(State's Exhibits 4 and 5 marked for identification.)

MR. ZAPF: Judge – Thank you. I would – And not by way of argument, but by way of presentation, whether this is considered an offer of proof, so that the record can be clear and that the Court can have my comments for purposes of review of this record in making an ultimate decision, I would like to provide to the Court two documents, one being State's Exhibit No. 4, a copy of which I've provided to defense counsel, which is pretty much a standard jury panel list that's prepared by the clerk of courts, that was provided to me, and this is a copy, my work sheet, that I used during the course of preparing for this trial, and also State's Exhibit No. 5, which is the strike sheet, if you will, with my work product on, a copy of which I've also furnished to defense counsel, and I'd like to file this document. Both of those are my original work products in the course of selection of this jury.

I would indicate, judge, that similar to the Court's concern at the onset of this hearing, but for Mr. Vetzner saying that Mr. Echols was black, I have had no knowledge or no recall that Mr. Ed Echols was a black person. I have nothing other – I have nothing in my file, nothing, that indicates he was a black man. I reviewed the court file and there's nothing, absolutely nothing in the court file that would indicate he is a black man. I assume, based on this record, that if Mr. Vetzner says he was a black man and if Mr. Sumpter says he was a black man – obviously Mr. Vetzner wasn't there – Mr. Walker says Mr. Echols was a black man, that – and I can appreciate the Court taking the position that Mr. Echols was a black man, but for purposes of my recollection, until such time that the motion for post-conviction relief was raised, I had no independent recall, nor do any of my notes reflect that Mr. Echols was a black man. And I can state unequivocally on this record that the striking of Mr. Echols was not in any way some type of systematic exclusion of a black person to sit on this particular trial.

It is difficult to go back in time and now try to recreate and reconstruct what was the thought going into the preemptory strikes by both the defense and the state. Strategy, I imagine, was part of it, and what I'm offering to the Court by way of the two exhibits is an indication that the – in preparation for the voir dire I received the State's Exhibit No. 4, which listed a number of jurors that were to be called. In reviewing the jury questionnaires that would accompany those jurors being qualified to sit as jurors, you will note that my work product suggests that I numbered between one and I just ran off my copy here to page two up to juror no. 906. In other words, I

was reasonably informed that it would be from juror no. 841, commencing on page one, to juror no. 906, on page two, and I reviewed juror questionnaires and I made certain notations relative to their age, marital status, children, and brief notes in terms of that information.

You will note, however, Your Honor, that Mr. Echols, juror no. 944, there is no notation on this State's Exhibit No. 4, relative to that kind of background information. It is my belief and recall that what, in fact, happened is that we were given a list of prospective jurors, I reviewed those prospective jurors and the questionnaires that would accompany those propspective jurors, and when we came in on the day of trial that list of prospective jurors was expanded, and then at the time then existing, I did not have in my possession sufficient amount of background or the list of jurors or the jury questionnaires relative to those other jurors that were called to be prospective jurors. My notes on my work sheet, State's Exhibit No. 5, indicate that he was a juror, no. 944, no other information, and he was struck as – Plaintiff's Exhibit No. 3 – he was not struck as a juror no. 1, which I think the Court can glean if there was some kind of effort to selectively or systematically exclude, that arguably, he may very well have been the no. 1 juror. I assume if there's an argument being made in that direction, then I would indicate that four jurors were struck. Apparently, I reconsidered on a Mr. Conklin, juror no. 910, and the other jurors are listed as my prospective preemptory strikes. My strikes are then recorded in the court file on the office strike list that is part of this record.

Other than that information, I have no other recall or no other information as to Mr. Echols, and therefore I am

without sufficient memory or recall, based upon the delay of this motion, to be able to give any further justification as to why Mr. Echols was struck, other than what I provided to the Court, which was the reasonable belief that I did not have sufficient enough background information at that time relative to that particular individual, and that would go to probably an argument of the delay.

I suspect that in terms of argument, maybe one of the problems here is that it is incumbent upon the defense to make a timely objection, to inquire as to the circumstances, and not wait over two and some odd months – two years later, plus, for a decision or an explanation, but that is my offer of proof relative to the striking of Mr. Echols. . . .

EXCERPT FROM TRANSCRIPT OF POSTCONVICTION MOTION HEARING
(Page 126, line 22 to Page 133, line 2)

[MR. ZAPF:] Secondly, I don't think the Court can make any finding that based on this record, that even if there was some deficiency, and the Court can guage whether or not Mr. Sumpter should have known of the *Batson* decision, whether or not that, in and of itself, prejudiced the defense.

Clearly, the defendant benefited by the testimony that was brought out at trial relative to the inability to make identification during the lineup procedure. So, I don't believe the defendant has made its showing – sufficient showing that Attorney Gary Sumpter was ineffective, and on that basis, the motion of defense counsel should be denied.

Judge, Wisconsin has kind of indirectly addressed this most recently in a case, *State v. Cook*, and I'm sure that the Court will, and probably has, vigorously reviewed the *Batson* decision, and the *Batson* decision specifically indicates there's three ingredients for the defendant to make out a prima facie case. And the first ingredient, as previously discussed on the record, is that the defendant has to be a member of a racial group. That's clearly recognizable. And that the prosecutor has

exercised his preemptory challenge to remove from the veneer members – a member of the defendant's race. Conceding for argument purposes only, that it has been established to the Court's satisfaction that Mr. Echols was a black person, the next element is that the defendant is entitled to rely, in fact, on the preemptory challenge practice that permits the fact that a black juror was struck, that there might be some – some inference. But the third element is that the defendant must show that these facts, and this is from the *Batson* decision, together with any other relevant circumstances, raises an inference that the prosecutor used the practice, and I used the word "practice," to exclude that juror because of race, because of race.

This record is now closed and there's not one scintilla of evidence that Mr. Echols was struck because of his race and solely because of his race. Now, in *Batson*, while the Court is correct, they didn't provide a lot of direction and parameters on how to address this, quite frankly, the concurring opinions and even the dissenting opinions provide more inquiry as to the problems that the *Batson* decision was going to create. But the majority held that the Court can consider the pattern of strikes, and I think now, in terms of reflection, what they're referring to is a kind of a kickback to the prior cases which would suggest that there had to be this pattern of a systematic exclusion, and that you couldn't necessarily find that a defendant met its burden unless there was this history of more than one case.

Well, *Batson* stands for the proposition that, yes, you can have a problem and discrimination even in one case, but what the Court is suggesting by the test is you have

to look for this pattern, a pattern of striking of black jurors. In the *Batson* case, the prosecutor struck all six black jurors. There wasn't any doubt about that inference that could be drawn there, and that's why they reversed in that case. The question that is more difficult to address, and I think the dissenting and concurring opinions address that, the mere fact that one black juror is struck, does that, in and of itself, and that fact alone, rise to the level of the inference that *Batson* stands for, or for the Court to entertain and require the prosecutor to make a showing or give some explanation?

I think the concurring and dissenting opinions are questioning that, and I think that's the confusion that Your Honor and other judges will have to address as to what's really being said here. But certainly, in this case, based on this record, Your Honor cannot find, and I don't believe this record can establish, that Mr. Echols being one of the black – one black juror who was struck as a plaintiff's right, as the – I think the third juror or third strike, is a sufficient showing to say, yup, Mr. Zapf struck that juror solely because he was, in fact, black. And that's why I don't believe that today that burden shifts to the state, and I don't believe that even if, assuming arguendo, that Mr. Sumpter had been aware of it, that back on the day that that jury was picked, December 15th of 1986, that Your Honor would even have had to require the prosecutor, based on the facts then known and all the attendant circumstances, to require the prosecutor to have to give an explanation based upon the information available at that time.

So if the Court follows my reasoning then, then even if Mr. Sumpter did not know the *Batson* decision, and

assuming that he did make an objection, the question is, the Court, more than likely, based on the same evidence, would not have granted or required the prosecutor to have made some explanation. But even assuming today or then, the Court would have required an explanation, as I have given to the best of my ability and recall, the question is, did this defendant receive a fair trial, was that jury an impartial jury?

Judge, I got the impression from what I heard today, and the fact that Mr. Sumpter is the one who recorded that Mr. Echols was black – I didn't even record that Mr. Echols was black – and I don't recall that today, but Mr. Sumpter seemed to take note of his race and color, obviously the defendant did, and we have heard testimony. I'm not saying that there's some reverse discrimination going on here, but one of the questions, after review of the *Batson* decision is I'm wondering if in a similar situation, if we're looking for a fair and impartial jury, a question that comes to my mind is whether or not when a defense attorney strikes jurors for a particular reason dealing solely with race, does the state have a right to object, so that the record that is made cannot come back on appeal that for some reason there was an ineffective assistance of counsel in selecting or striking jurors solely because of race?

I don't have an answer to that question, and I don't know if the Courts have addressed that, and I don't know if that objection really runs to the prosecution or the state. Obviously, we're dealing here with an equal protection due process question. But in the case that I referred to earlier, *State v. Cook* –

MR. VETZNER: Excuse me.

MR. ZAPF: – cited at 141 Wis. 2d 42, the decision was August 5th of 1987, the case itself, Your Honor, dealt with the state's refusal to consent to a waiver of jury trial. I believe that was decided in our district to the Court of Appeals. But the issue on appeal was whether or not the state could refuse. What is important about that decision is that the defense tried to raise that right to give up their jury trial to a kind of an equal protection argument, and the Court, in *Cook*, said, Wisconsin courts require a high level of proof to show a denial of equal protection on discretionary acts of the prosecutor, that the defendant, in order to sustain his burden of establishing a prima facie case, must establish a persistent and intentional discrimination.

What I'm trying to do, judge, is give the Court some direction as to how do we guage and what weight should we give to back on December 15th of '86 that one black juror who was struck as the no. 3 strike was – meets the *Batson* criteria? Clearly, *Batson*, in our fact situation, are like night and day. But the Court goes on to indicate that the only situation where reasons are required for the prosecutor is that when it's been established that the *sole* – underlining the word sole – basis for making the peremptory challenge was based on the juror's race.

So, based upon our Wisconsin courts addressing the standard of a high level of proof, I don't believe the defendant has met the requisite burden, and we would ask leave of the Court to deny and/or dismiss the defendant's motion. Thank you, Your Honor.

EXCERPT FROM TRANSCRIPT OF POSTCONVICTION MOTION HEARING
(Page 133, line 22 to Page 145, line 10)

MR. VETZNER [defense appellate counsel]: I'm going to try to treat the two issues separately, the *Batson* question and then the motion challenging the eyewitness identification. First of all, in regard to the *Batson* issue, I think the first part of the inquiry ought to be whether counsel's performance was deficient in that he did not know of the decision, and did his failure to object, quite clearly from his testimony, was not a tactical decision on his part. During the course of the hearing, you raised the question about at what point –

THE COURT: Excuse me, counsel. Don't you think the Supreme Court's going to say you have to know about these things all the time?

MR. VETZNER: Yes.

THE COURT: All right. So let's move on to from that point on. Is that so ineffective assistance of counsel, and then even if that was, what would be the remedy even under *Batson*? What is the remedy? Is it a new trial?

MR. VETZNER: Yes.

THE COURT: You think it is? Do you have any cases for – in that regard?

MR. VETZNER: Okay. No.

THE COURT: Okay.

MR. VETZNER: There's a clear conflict between the language and cases such as *Strickland*, which concern ineffective assistance of counsel and the *Batson* line of

cases. Obviously, in the normal ineffective assistance of counsel case, it's necessary to establish prejudice as a result of the supposed deficient performance. I concede – And normally it's the defense burden to establish prjudice. I concede that I have not established prejudice in the traditional sense of how it would affect the outcome, and I guess I would concede or submit that it's impossible to do so. Obviously, the *Batson* case is a per se reversal type of situation, that the – there's no question in my mind that if Mr. Sumpter had made an appropriate objection at the time and a determination were made on where along the line at the trial court or at the appellate court that the prosecutor did not have a valid reason, that *Batson* mandates automatic reversal. I think it's clear from the *Batson* decision that it is an automatic reversal type situation. There certainly was no discussion of prejudice.

The one thing I would note in this regard, Your Honor, is that the *Strickland* case does note that there are certain exceptions to the prejudice prong. They talk about where there's a denial of counsel, where there's a conflict of interest, and whether – and where there's – a third category is where the ineffectiveness is due to some action or provision on the part of the state, not this type of situation. I would emphasize, however, that *Strickland* does not seem to be written in its own terms, that there's always got to be prejudice. There seems to be a recognition that there are certain types of situations where the prejudice prong can't be met and does need to be met. By the same token, Your Honor, it seems *Strickland* also says that the burden of proving everything has got to be on the defense. It seems that even Mr. Zapf seems to

acknowledge that a *Batson* type of situation is an exception to *Strickland*. In other words, is it my burden to show that Mr. Zapf did not have a valid reason for striking the black or is it Mr. Zapf's, the prosecution's, burden to come forward and affirmatively show a reason?

The *Batson* decision used the language that if the burden were on the defense, that it would be a crippling burden that it would be impossible to ever meet it. Yet, if we're going to follow *Strickland* right down the line, Mr. Zapf – and this Court could have taken the position that Mr. Zapf didn't have to say anything to even attempt to explain why this – he exercised his strike against Mr. Echols. It essentially would be my burden to independently present evidence that it was done for an invalid reason and that's – it's simply an impossible situation.

What I would have to say, in all candor, is that there really is a conflict between the ineffective assistance of counsel line of cases and the *Batson* line of cases. And I've done research on it. I have a law student who's done research and we haven't been able to find anything that reconciles it. But it seems to me that, given the climate in the U.S. Supreme Court and their attitude toward reversing criminal convictions, in the absence of some indication affirmatively that the defendant was innocent, or at least, some strong indication of a denial of a fair trial process, it's – that nevertheless, the Surpreme Court seemed to feel that, at least in some situations, there's considerations that are even more paramount than keeping a convicted offender in prison under a conviction. And it seems to me one of those is a concern that our criminal justice system operate in a fashion that does not perpetuate racial discrimination, and I think that's the

only way to read the *Batson* decision, that there are some things that are more imporant.

One of them is abolishing racial discrimination. So, I think the Supreme Court seems to be saying we can't control society, but we sure as heck can control the administration of social justice, and whatever discrimination is going to exist in society, we're going to try to purge it from the criminal courtroom, and that seems to be a compelling interest on the part of the Court, and I think that that takes precedent. Does the Court want me to address Mr. Zapf's reason for exercising the preemptory challenge?

THE COURT: It's up to you.

MR. VETZNER: I'll try to do that briefly. What I understand, as I – what I heard Mr. Zapf saying, was I don't remember the reason, but whatever it was, it wasn't racial discrimination. I don't believe that that's an adequate rationale consistent with the *Batson* case. I'm perfectly willing to accept the truthfulness of his assertion that he doesn't remember. Obviously, because I didn't know until today exactly what Mr. Zapf was going to be saying in this regard, it's hard for me to – I'm not prepared to deal with a lot of cases. There is one case that I would call to the Court's attention that I think may deal with that to some extent, a case called the *United States v. Thompson*. It's 822 F2d 1254, and particulary at page 1262. The situation there was a little bit different, but basically what the Court did was remand for an evidentiary hearing as to the reasons given for the exercise of the strikes. And what the Court then said in its order for remand was, quote, "If the district court finds that the passage of

time has rendered such a hearing meaningless, it shall vacate defendant's convictions and schedule a new trial."

So, to the extent that part of what I heard the prosecution saying was that the lack of recollection is not its fault, and therefore that the inability to reconstruct the situation is attributable to the defense, I think that the *Thompson* case has some bearing on that.

Now, obviously, we have this question that's lurking here about whether or not this motion is timely or not, and I'm not going to address that now. I think that the papers that I filed previously deal with it. If the Court believes that there's a need for further discussion on that, I guess I'll rely on the Court's request in that regard.

Briefly, on sort of the alternative prong that the prosecution came forward with in terms of the reason for the strike, what I heard the prosecution saying was basically, I didn't know anything about jurors after 906. So since I didn't know anything about the juror, Juror Echols, I struck him. I'd have two response to that. First of all, the fact that Mr. Zapf didn't know anything about juror 944, Mr. Echols, certainly would not have precluded him from asking some questions at the voir dire. If he thought it was relevant to know whether he was married, whether he had children, how long he'd been at his job, or whatever other information he may otherwise gleaned from the questionnaires, he certainly was free to ask those questions in voir dire. I think it's significant that there was not one question asked of Mr. Echols. The other point about that –

THE COURT: There were questions. There were questions asked of the entire panel.

MR. VETZNER: That's correct.

THE COURT: All right.

MR. VETZNER: I'm saying there was no – There was no question asked specifically of him, and I would note that to the extent that there were responses of things such as knowing prosecution witnesses or defense witnesses or knowing the prosecutor or the defense attorney or something that may be a signal or a red flag to be concerned about the juror, that Mr. Echols did not in any way respond affirmatively to any of those problems. No problem about inability to serve, no problem about knowing the participants, et cetera. In other words, the voir dire in this case does not itself suggest any reason affirmatively as to why the strike would have been issued.

I'm certain that there are cases that arise where the prosecution will exercise a preemptory challenge to a black juror, and there might not be cause, but it seems to me the nature of the tenor of the voir dire itself may have made it very clearly apparent as to reasons why that particular juror would be stricken. For example, if the juror says that he has a natural inclination to disbelieve police officers but will make an attempt to put that inclination aside, it seems to me that a prosecutor isn't going to have to go very far to come up with an affirmative reason for the strike aside from race.

The other thing that I wanted to mention in that regard, and I guess I would invite Mr. Zapf to interject if I'm incorrect, but it's my belief, as I understand the record in this case, that even though he claimed to only be familiar with the jurors through no. 906, according to his markings on the jury panel sheet, that he did allow

jurors to sit beyond no. 906; that he did not just automatically strike every juror beyond 906.

And, finally, I think that just consistent with *Batson*, I don't think it's good enough to say I didn't know anything about this juror, so therefore I struck him, but race wasn't a factor. One other point on that aspect of it, Mr. Zapf made, I think, a legitimate point that in this case there was only one black on the panel, and that that's somehow different than a situation if there's three blacks and all three are stricken. Certainly, it – there might be a stronger inference when there's more. The problem with somehow trying to crystallize that into a rule of law is that if he did so, I think it would basically give Kenosha a pass on complying with *Batson*.

I went to the library, and based on the 1980 census, there is a document called the Summary Characteristics for Governmental Units and Standard Metropolitan Statistical Areas for Wisconsin, and what that showed was that Kenosha County, as of 1980, had 123,137 persons. The number of blacks was 2,886. Now, what that means is that when there's one black juror out of 20 sitting there waiting for voir dire, that's a higher statistical representation on that jury panel than would be found in the population as a whole. You may have experiences, obviously, as a judge here that would contradict what I'm saying, but it just seems to me that there aren't going to be a lot of situations here where there's going to be four black jurors, prospective jurors, or three black jurors. Basically, if there's one out of 20, that's a higher percentage than there are in the population. So if we say that this doesn't apply when it's one out of 20, it virtually saying

that *Batson* doesn't apply in Kenosha County, and I don't think that's what was intended.

THE COURT: Wasn't the law, though, even on *Veniremen* on calling the jury, to prove a significant deprivation? Didn't you have to show a statistical representation and didn't you have to have at least – or don't you have to have at least a 10 percent representation in the population before there is any kind of significance to the fact that that particular racial group is not called to the box? Don't you need at least a 10 percent of the population in order for you to be able to show a deprivation of constitutional rights in not having it, a representation of that group in your panel?

MR. VETZNER: Are you talking about the selection procedures?

THE COURT: Yes.

MR. VETZNER: I'm not conversant with the particular case you're referring to. If you say that's so, I assume it's so. Obviously, I'm not challenging the fact that there was only one out of 20. I guess what I'm saying is that –

THE COURT: You're saying statistics are higher because of the fact that so seldom would there be a black on the panel in Kenosha based upon half a percent, or I guess 2,000 out of 120,000 is what, less than –

MR. VETZNER: Less than three percent. One out of 20 is five percent. Mr. Walker's panel here, considering he had expressed these concerns, ironically, even before the trial about wanting blacks, he was lucky that there was even one black in that panel, and I think to say – and I'm obviously not challenging the fact that there was only one

out of 20. That's not the focus that we're making here. That's really all I have to say about the *Batson* issue unless the Court has some further questions about it.

MR. ZAPF: Judge, I have one remark, and it's one just to clarify, it's not to interrupt.

MR. VETZNER: Sure, it's fine.

MR. ZAPF: It would seem to me that counsel's position very clearly is the mere fact in this case that a black juror was struck is all that is necessary for the defense to object and the Court – it would then be incumbent upon the Court to shift the burden to the prosecutor to have – to give an explanation, nothing more shown. The mere fact that a black juror was struck on a preemptory strike is all that is necessary without any further showing.

MR. VETZNER: No, it has to be a black defendant also.

THE COURT: I don't know if that's the law of *Batson*. That's the way I happen to read it, Mr. Zapf. That's just my reading.

MR. VETZNER: That's certainly the position that I'm taking, so –

THE COURT: All right.

MR. VETZNER: That's right, I'm not going to dispute that at all. . . .

No. 90-41

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1990

STATE OF WISCONSIN,

Petitioner,

v.

LIONEL D. WALKER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

CHARLES BENNETT VETZNER
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TABLE OF CONTENTS

Page

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. PETITIONER SHOULD BE FORECLOSED FROM BRINGING A CHALLENGE TO THE STATE COURT'S APPROACH TO THIS CASE BY ACQUIESCING IN THAT APPROACH 3

II. THE PROPRIETY OF THE WISCONSIN SUPREME COURT'S DISCRETIONARY DECISION TO REACH THE MERITS OF THE FEDERAL CONSTITUTIONAL CLAIM RATHER THAN TO RELY ON A PROCEDURAL DEFAULT TO PRECLUDE RELIEF IS A STATE LAW QUESTION WHICH WARRANTS NO FURTHER REVIEW BY THIS COURT. 5

III. THE QUESTION OF HOW TO APPLY THE PREJUDICE STANDARD IN EVALUATING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR FAILURE TO MAKE A *BATSON* OBJECTION IS WORTHY OF REVIEW BUT CANNOT BE CONSIDERED IN THE PRESENT CASE. 10

CONCLUSION 11

APPENDIX 100

TABLE OF AUTHORITIES

CASES CITED

Ake v. Oklahoma,
470 U.S. 68 (1985) 6

Batson v. Kentucky,
476 U.S. 79 (1986) ..... 2 passim

Caldwell v. Mississippi,
472 U.S. 320 (1985) 6, 7

Hankerson v. North Carolina,
432 U.S. 233 (1977) 6

Harris v. Reed,
___ U.S. ___, 109 S. Ct. 1038 (1989) 5

Henry v. Mississippi,
379 U.S. 443 (1965) 6, 7

James v. Kentucky,
466 U.S. 341 (1984) 6

Johnson v. Mississippi,
486 U.S. 578 (1988) 6

Jones v. Butler,
864 F.2d 348 (5th Cir. (1988) 8

Michigan v. Long,
463 U.S. 1032 (1983) 7-8

Mullaney v. Wilbur,
421 U.S. 684 (1975) 6

State v. Cleveland,
118 Wis. 2d 615, 348 N.W.2d 512 (1984) 3, 4, 7

State v. Machner,
92 Wis. 2d 797, 285 N.W.2d 905 (App. 1979) 2

State v. Rembert,
99 Wis. 2d 401, 299 N.W.2d 292 (App. 1980) 2

Steagald v. United States,
451 U.S. 204 (1981) 4, 5

United States v. Forbes,
816 F.2d 1006 (5th Cir. 1987) 8, 9

United States v. Frady,
456 U.S. 152 (1982) 10

Wainwright v. Sykes,
433 U.S. 72 (1977) 9

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Statutes

28 U.S.C. § 2255 1

Wisconsin Statutes

809.30(2)(h) 1
809.30 1
974.06 1

STATUTES INVOLVED

809.30 Rule (Appeals in felony cases). (1) DEFINITIONS. In this section:

(a) "Postconviction relief" means, in a felony or misdemeanor case, an appeal or a motion for postconviction relief other than a motion under s. 973.19 or 974.06

* * *

(2) APPEAL OR POSTCONVICTION MOTION BY DEFENDANT. (a) A defendant seeking postconviction relief in a felony case shall comply with this section.

* * *

(h) The defendant shall file a notice of appeal or motion seeking postconviction relief within 60 days of the service of the transcript.

(i) The trial court shall determine by an order the defendant's motion for postconviction relief within 60 days of its filing or the motion is considered to be denied and the clerk of the trial court shall immediately enter an order denying the motion.

(j) The defendant shall file an appeal from the judgment of conviction and sentence and, if necessary, from the order of the trial court on the motion for postconviction relief within 20 days of the entry of the order on the postconviction motion.

STATEMENT OF THE CASE

Contrary to the assertion of petitioner, the postconviction motion filed by respondent Walker was part of his direct appeal. Petitioner stated the motion was brought under Wis. Stat. sec. 974.06--a collateral attack procedure modeled on 28 U.S.C. § 2255. Petition at 4 & n.4. In truth, the motion was filed pursuant to Wis. Stat. sec. 809.30(2)(h). Resp. App. 101-102. This is a provision in the Wisconsin Rules of Appellate

Procedure which allows a convicted offender to seek redress in the trial court prior to filing a direct appeal of the conviction. The provision may be used, as it was here, to convene an evidentiary hearing concerning a claim of ineffective assistance of counsel at trial. *See, e.g., State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (App. 1979).

Petitioner also notes that the postconviction motion was filed nearly 17 months after the initial jury verdict, Petition at 3, but fails to provide any explanation for this delay. Accordingly, it should be noted both that a substantial portion of this time period is attributable to the court reporter's failure to prepare a transcript of the jury selection process and that the Wisconsin Court of Appeals, which supervises compliance with appellate rule time limits, *State v. Rembert*, 99 Wis. 2d 401, 299 N.W.2d 292 (App. 1980), was fully apprised of the circumstances. Resp. App. 103-104.

SUMMARY OF THE ARGUMENT

Respondent contends that this court should deny review on the first issue raised for two reasons. First, petitioner failed either to raise his present claim in the state courts or to oppose in any fashion the urgings of respondent that the state appellate court exercise its discretion to resolve the underlying claim based on *Batson v. Kentucky*, 476 U.S. 79 (1986), in light of the factual record developed at a postconviction evidentiary hearing.

Second, the discretionary decision of a state appellate court to reach the merits of an asserted federal constitutional violation rather than to deny relief on the basis of a procedural default is a state law question not subject to review in this Court.

The second issue raised is worthy of review but is not ripe for disposition by this Court.

ARGUMENT

I. PETITIONER SHOULD BE FORECLOSED FROM BRINGING A CHALLENGE TO THE STATE COURT'S APPROACH TO THIS CASE BY ACQUIESCING IN THAT APPROACH.

The petition in this case may convey the notion that the state supreme court's decision to disregard the absence of an objection by trial counsel was totally unanticipated. However, the approach adopted by the court was one utilized previously and urged upon the court here by Walker without objection by petitioner.

In *State v. Cleveland*, 118 Wis. 2d 615, 348 N.W.2d 512 (1984), the Wisconsin Supreme Court reviewed an intermediate appellate decision finding trial counsel ineffective for failing to file a motion to suppress the fruits of a search. Rather than reviewing the issue in that framework, the supreme court decided that the importance of the issue warranted a resolution of the validity of the challenged search, notwithstanding the failure of defense counsel to make the appropriate objection.

In his appellate brief in this case, Walker not only claimed that he was deprived of his right to effective counsel, but also relied on the *Cleveland* case in an alternative argument that the court should dispense with the ineffective assistance of counsel framework and simply treat this case as a substantive violation of the rights provided by *Batson v. Kentucky*, 476 U.S. 79 (1986). Respondent's Wisconsin Court of Appeals

Brief at viii, 37. Petitioner made no response whatsoever to this issue and accompanying argument.[1]

Having ignored the *Cleveland* approach in his brief, counsel for petitioner was asked point blank during the Wisconsin Supreme Court oral argument in this case about the propriety of ruling on the *Batson* issue without regard to ineffective assistance of counsel. Petitioner's response was equally succinct: "I think you can do that." Transcript of Oral Argument at 48.[2] Not only did petitioner fail to raise its present challenge in the Wisconsin courts, but it also gave no indication that resolving the case under a *Batson* analysis was problematic in any way.

In light of petitioner's languid performance in state court, this court should, consistent with its decision in *Steagald v. United States*, 451 U.S. 204 (1981), decline to entertain the belated challenge. In *Steagald*, the government's Supreme Court brief on a fourth amendment issue raised a claim that the defendant lacked a reasonable expectation of privacy. This point had never been raised prior to the filing of the brief. Moreover, in the lower courts and in responding to the petition for certiorari, the government made representations implying that the defendant had a possessory interest in the area searched. This Court observed that a party loses its right to bring a challenge

> when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts or

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1 The briefs filed by the parties in the Wisconsin appellate court are available for review as they have been lodged with the Clerk of the Supreme Court.

2 The full Wisconsin Supreme Court oral argument certified transcript has also been lodged with the Clerk of this Court.

> when it has failed to raise such questions in a timely fashion during the litigation.

451 U.S. at 209.

That principle was applied in *Steagald* as the government lost its right to bring a privacy claim "through its assertions, concessions, and acquiescence." *Id.* at 211.

The conduct of petitioner here differs little from the behavior of the government in the *Steagald* case. Accordingly, this Court should likewise conclude in the case at hand that petitioner's failure to voice opposition of any sort, much less in the precise terms now being raised, to the state court reaching the merits in the absence of a contemporaneous objection precludes such a challenge from being mounted at this late date.

II. THE PROPRIETY OF THE WISCONSIN SUPREME COURT'S DISCRETIONARY DECISION TO REACH THE MERITS OF THE FEDERAL CONSTITUTIONAL CLAIM RATHER THAN TO RELY ON A PROCEDURAL DEFAULT TO PRECLUDE RELIEF IS A STATE LAW QUESTION WHICH WARRANTS NO FURTHER REVIEW BY THIS COURT.

This Court has frequently been called upon to assess the implications of a state court determination that a litigant has waived the right to invoke a federal constitutional claim as a result of a procedural default. Several basic rules have emerged from the decisions in this area. First and foremost, this Court will not consider an issue of federal law on direct review where the judgment in state court rests on an adequate and independent determination that the federal claim was forfeited by violation of a state procedural rule. *See Harris v. Reed,* ___ U.S. ___, 109 S. Ct. 1038, 1042 (1989). However, if the state court excuses the procedural

default and resolves the case on the basis of the substantive federal issue, this Court, too, is entitled to review the federal issue. *Caldwell v. Mississippi*, 472 U.S. 320, 327-28 (1985). Even if the state court relies on the procedural default to foreclose relief, this Court still retains the power to review the federal substantive claim if it determines that the supposed default is not an adequate or independent basis for the decision. *James v. Kentucky*, 466 U.S. 341 (1984); *see Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988); *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985).

A common thread running through all these decisions is that procedural default in a state prosecution is a state law question. Thus, for example, when this Court held in *Hankerson v. North Carolina*, 432 U.S. 233 (1977), that *Mullaney v. Wilbur*, 421 U.S. 684 (1975), applied retroactively, it noted that the reach of the ruling could be limited if the States chose to enforce "the normal and valid" contemporaneous objection requirement. 432 U.S. at 244 n.8. This Court has made clear that "when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). Yet this is because of the policy concern that a state default serving no legitimate state interest would "bar vindication of important federal rights." *Id.* at 448.

The approach advanced by petitioner in this case is inconsistent with the underlying premise of all the above-cited cases that the state court's reliance on a state procedural rule is, at the outset, a state law issue. Petitioner cites no precedent from this Court which suggests that a state court's refusal to rely on a state procedural rule to foreclose relief on a federal constitutional claim is itself a federal issue. That state court adoption of a procedural default principle is subject to review by this Court

does not lead logically to similar scrutiny of a state decision not to rest its decision on a default. As noted in *Henry v. Mississippi, supra,* the validity of a procedural default will be scrutinized in federal court to prevent unwarranted erosion of the substantive federal right. When the state court itself decides that vindication of the federal right should take precedence over preserving the procedural default principle, no similar policy concern warrants this Court's expansion of its jurisdiction to protect the procedural rule. Petitioner offers no justification to invert the rule of *Caldwell v. Mississippi, supra,* and have this Court review a procedural default which the state court excused rather than the substantive federal issue resolved below.

The specific situation here only reinforces the notion that petitioner is seeking review of a nonfederal issue, *i.e.*, whether the state court can exercise its discretion to resolve the substantive violation of the right to fair jury selection procedures rather than foreclose relief due to the absence of a contemporaneous objection. The Wisconsin Supreme Court's decision to analyze the facts here as a possible violation of the principles in *Batson v. Kentucky, supra,* is not based on any misinterpretation of that case, but on its own precedent in *State v. Cleveland, supra,* to examine the substantive constitutional issue once a full evidentiary record has been developed, albeit a record made in the context of an ineffective assistance of counsel claim. A grant of review here would do nothing either to clarify any lingering ambiguity in the *Batson* case or to resolve inconsistent interpretations of the decision. On the contrary, review of the issue posed can only cause disruption and confusion concerning "sensitive issues of federal-state relations . . ." *Michigan v. Long,* 463 U.S. 1032, 1039

(1983), by limiting state court authority to follow its own precedents to excuse a procedural default.

It should be emphasized that the state court resolution of the *Batson* issue here occurred only after the relevant facts were fully developed. The grant of relief did not derive from a conclusion that the prosecutor's removal of a black juror warranted relief without regard to full development of the facts. Petitioner offers no challenge to the finding or the reliability of the process for finding the critical facts which were essential to the ultimate legal conclusion. These facts include: that Walker is black; that actions of the prosecutor here eliminated all blacks from the jury; that the responses of the black prospective juror during *voir dire* did not suggest a "disqualifying attitude"; that the prosecutor directed no special inquiries to that juror; and that prosecution witnesses were white and defense alibi witnesses were black. Petitioner's App. 19. Moreover, while petitioner places emphasis on the prosecutor's avowed lack of a detailed recollection, no express challenge is made to the Supreme Court determination based on the record that the black juror in this case was stricken because the prosecutor knew nothing about him. Petitioner's App. 19.

Thus, this case is in a substantially different posture than cases such as *Jones v. Butler*, 864 F.2d 348 (5th Cir. (1988), and *United States v. Forbes*, 816 F.2d 1006 (5th Cir. 1987), upon which petitioner relies to suggest a conflict. In *Jones* the state court had relied on the absence of a contemporaneous objection to foreclose relief and, consistent with existing Supreme Court precedent, discussed above, the federal court treated this rationale as an appropriate reliance on a procedural bar. Nothing in the decision suggests that the state courts had been foreclosed by *Batson* from

granting an evidentiary hearing and then resolving the substantive issue on the basis of the resulting record.

In *Forbes*, the federal court emphasized that a contemporaneous objection was necessary to prevent defense attorneys from "sandbagging" and to cure the alleged error by remedies short of reversal after conviction. 816 F.2d at 1011. While these cogent observations certainly support a contemporaneous objection requirement when the prosecutor strikes a black prospective juror, they are by no means unique. On the contrary, this Court in *Wainwright v. Sykes*, 433 U.S. 72 (1977), adopted the same theories as *Forbes* in treating a state court reliance on the absence of a contemporaneous objection as a valid state procedural ground to deny relief to federal habeas corpus applicants, absent a special showing of cause and prejudice. In short, the contemporaneous objection requirement in a *Batson* context differs neither in form nor rationale from a similar rule during any other part of a state prosecution. No reason has been advanced or is otherwise apparent why the need to object to the striking of a black juror should be treated as a substantive federal constitutional issue while every other contemporaneous objection requirement is deemed a state procedural ground. The contemporaneous objection requirement serves valid state interests, as identified in the *Sykes* case, but it is clear that if a state court is willing to forego reliance on the procedural requirement and resolve a federal constitutional question on the merits, it is free to do so.[3]

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3 Petitioner argues that the Wisconsin Supreme Court decision at issue exposes virtually every state conviction since 1986 to review and reversal. Petition at 13. This dramatic assertion is largely premised on petitioner's erroneous belief that this case arose as a collateral attack on the conviction--the format which would be followed for convicted offenders seeking belated review

continued on page 10

No reason exists to treat a timely *Batson* objection as fundamentally different from all other objection requirements and to prevent a state court from bearing the consequences of reaching the underlying constitutional claim. Quite simply, the need to object to the striking of a black juror is no more a federal question than any other contemporaneous objection requirement or similar procedural rule which is employed and enforced in a state prosecution.

III. THE QUESTION OF HOW TO APPLY THE PREJUDICE STANDARD IN EVALUATING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR FAILURE TO MAKE A *BATSON* OBJECTION IS WORTHY OF REVIEW BUT CANNOT BE CONSIDERED IN THE PRESENT CASE.

Walker concedes as a general matter that this Court should at the earliest possible time review the seeming incongruity of the obligation to evaluate prejudice resulting from a deficient trial counsel performance and the established precedent treating *Batson* violations as not susceptible to harmless error analysis. However, this is the wrong case at the wrong time to use as a vehicle for clarifying the law.

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continued from page 9

of a *Batson* claim. It is unlikely that the Wisconsin Supreme Court would exercise its discretion to reach the merits in such a collateral attack context. *Cf. United States v. Frady*, 456 U.S. 152, 166 (1982) (traditional plain error standard for direct appeals does not apply to collateral challenges to the conviction). Indeed, the exercise of discretion to reach the merits here hardly obliges the state court to do likewise even in other direct appeal cases where a contemporaneous objection is lacking. Moreover, the dire consequences predicted here are no different than those which could be theorized for any state court decision not to rely on a procedural default for denying relief.

This Court can hardly review the application of the ineffective assistance of counsel prejudice standard when no court has ever even determined that trial counsel's performance was deficient. Because the Wisconsin Supreme Court chose to resolve the *Batson* issue directly rather than in the context of an ineffective assistance claim, the second issue raised by petitioner is not ripe for review. Even if this Court were inclined to grant the petition, it seemingly could only reach the first issue, and if it were resolved in petitioner's favor, this Court then remand for further proceedings which might result in a determination that trial counsel's performance was deficient.

CONCLUSION

The petition for certiorari should be denied.

Dated this 10 day of October, 1990.

Respectfully submitted,

CHARLES BENNETT VETZNER
Assistant State Public Defender for the State of Wisconsin

Post Office Box 7862
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(608) 266-8374

Attorney for Respondent.

APPENDIX

INDEX TO RESPONDENT'S APPENDIX

	Page
Postconviction Motion Filed in Trial Court	101-102
Wisconsin Court of Appeals Order	103
Letter from Respondent's State Court Appellate Counsel to Wisconsin Court of Appeals	104

STATE OF WISCONSIN CIRCUIT COURT Branch 6 KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 86-CF-327

LIONEL D. WALKER,

Defendant.

DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

Defendant, by the undersigned attorney, moves for post-conviction relief, pursuant to Rule 809.30(2)(h), from the judgment of conviction entered on January 28, 1987, the Honorable Jerold W. Breitenbach, presiding, sentencing defendant to ninety-nine years of imprisonment for four counts of armed robbery, contrary to sec. 943.32(1)(b)(2), Stats., as follows:

1. The jury panel in this case included only one black member, *i.e.*, juror #944, Edward Echols.

2. The prosecutor in this case exercised one of his peremptory strikes to exclude Mr. Echols from serving on the jury.

3. Defense counsel neither lodged an objection nor sought an explanation from the prosecutor for this act, as he was entitled to. *Batson v. Kentucky*, 476 U.S. 79 (1986).

4. Defense counsel's omission was not a tactical decision and was prejudicial.

5. An identification of defendant at a line-up on September 5, 1986, was introduced at trial in regard to all four counts. Trial transcript of December 15, 1986, at 41, 85, 113, 127, 129, 151.

6. No pretrial motion to suppress the fruits of the September 5 identification procedure was filed by defense counsel.

7. Defense counsel's omission was not a tactical decision.

8. Had such a motion been properly filed, the court should have concluded that the line-up was the fruit of an illegal arrest and ordered both suppression of the identification made at the line-up, *see, e.g., Gardner v. State,* 314 A.2d 908 (Del. Super. 1973), and exclusion of an in-court identification at trial, *see, e.g., In re Woods,* 20 Ill. App. 3d 641,314 N.E.2d 606 (1974).

9. On the basis of the foregoing paragraphs, it is submitted that defendant was deprived of his state and federal constitutional right to effective assistance of counsel.

WHEREFORE, it is requested that the present motion be granted, defendant's convictions be reversed, and a new trial be ordered.

Dated this 7 day of July, 1988.

CHARLES BENNETT VETZNER
Assistant State Public Defender

P.O. Box 7862
Madison, WI 53707
(608) 266-8374

Attorney for Defendant.

DISTRICT II

Office of the Clerk

COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, December 16, 1987

To:

Charles B. Vetzner
Asst. St. Pub. Defender

Clerk of Circuit Court
Kenosha, WI 53140

Barry M. Levenson
Asst. Attorney General

Hon. Jerold W. Breitenbach
Kenosha, WI 53140

Robert D. Zapf
District Attorney
Kenosha, WI 53140

You are hereby notified that the Court entered the following order:

#_____ - State of Wisconsin v. Lionel D. Walker
(L.C. No. 86-CF-327)

Before Brown, P.J.

On November 25, 1987, the defendant moved for an extension of time to file either a notice of appeal or postconviction motion. The defendant now moves to withdraw the motion on the ground that the extension is not necessary because an additional transcript will be filed and therefore the time will be extended automatically. The court agrees that the time will be extended automatically.

Upon the foregoing reasons,

IT IS ORDERED that the motion for an extension is dismissed as superfluous.

Marilyn L. Graves
Clerk of Court of Appeals

State Public Defender
Richard J. Phelps

Deputy State Public Defender
Judith P. Collins

The State of Wisconsin
STATE PUBLIC DEFENDER

131 W. Wilson St., 7th Floor P.O. Box 7862
Madison, Wisconsin 53707 (608) 266-3440

Chief, Trial Division
Marcus T. Johnson

Chief, Appellate Division
Eric Schulenburg

December 7, 1987

Ms. Marilyn Graves
Clerk, Court of Appeals
P.O. Box 1688
Madison, WI 53701

Dear Ms. Graves:

Re: State v. Lionel Walker, Kenosha County Case No. 86-CF-327

On November 25, 1987, I filed a motion in this Court seeking an extension of the deadline for submission of a notice of appeal or post-conviction motion. I am writing to request that this motion be withdrawn. On December 4, 1987, I learned that the court reporter has additional notes from the trial proceeding which have yet to be typed in transcript form. I requested that such a transcript be prepared on December 4.

In light of these circumstances, I believe that the deadline for filing a notice of appeal or post-conviction motion should be sixty days from my receipt of this additional transcript. Granting the motion which is now pending in the Court of Appeals, would, in light of these developments, only seem to create confusion as to the applicable filing deadline.

Thank you for your attention to this matter.

Very truly yours,

CHARLES BENNETT VETZNER
Assistant State Public Defender

CBV:jjn

cc: Office of the District Attorney
Kenosha County Courthouse
912 - 56th Street
Kenosha, WI 53140

(2)

No. 90-41

In The

Supreme Court of the United States

October Term, 1990

STATE OF WISCONSIN,

Petitioner,

v.

LIONEL D. WALKER,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

DONALD J. HANAWAY
Attorney General of Wisconsin

BARRY M. LEVENSON
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TABLE OF CONTENTS

Page

SUPPLEMENTAL STATEMENT OF THE CASE 2

TABLE OF AUTHORITIES

CASES:

Batson v. Kentucky, 476 U.S. 79 (1986) 2

State v. Walker, 154 Wis. 2d 158, 453 N.W.2d 127 (1990) 2

No. 90-41

In The

Supreme Court of the United States

October Term, 1990

STATE OF WISCONSIN,

Petitioner,

v.

LIONEL D. WALKER,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

SUPPLEMENTAL STATEMENT OF THE CASE

As promised in the State of Wisconsin's petition for certiorari, *see* Petition at 4 n.8, and in a followup letter dated July 25, 1990, to the Clerk of Court, petitioner advises the Court that in accordance with the mandate of the Wisconsin Supreme Court, *State v. Walker*, 154 Wis. 2d 158, 187-89, 453 N.W.2d 127, 139-40 (1990), the Kenosha County Circuit Court held a hearing on whether a post-arrest lineup should have been suppressed. The Kenosha County court concluded that the lineup evidence was not a product of Walker's illegal arrest and can be used by the prosecution in Walker's retrial. This decision is reprinted in the Appendix to this Supplemental Brief.

The Kenosha County Circuit Court's decision resolves in the State's favor one of the two bases for conducting another trial in this case. Now the only reason for proceeding with a new trial for Walker is the Wisconsin Supreme Court's determination that the State violated *Batson v. Kentucky*, 476 U.S. 79 (1986), in Walker's original trial even though Walker did not make a *Batson* objection until seventeen months after trial.

The State has already petitioned this Court to review the Wisconsin Supreme Court's application of *Batson*. In light of the Kenosha County Circuit Court's decision on the suppression issue, the State again urges this Court,

for the reasons set forth in the petition for certiorari, to grant the petition.

Dated this 18th day of September, 1990.

DONALD J. HANAWAY
Attorney General of Wisconsin

BARRY M. LEVENSON
Assistant Attorney General
of Wisconsin
Counsel of Record

CHRISTOPHER G. WREN
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STATE OF WISCONSIN: KENOSHA COUNTY: CIRCUIT COURT:BR 2

STATE OF WISCONSIN,

Plaintiff,

V.

LIONEL D. WALKER,

Defendant.

DECISION AND ORDER

Case No. 86-CF-387

This case is before the court on remand from the Wisconsin Supreme Court pursuant to it's [sic] reversal of defendant Walker's convictions for four counts of armed robbery. Prior to any new trial, this court must determine whether the lineup identification evidence must be suppressed as the fruit of Walker's unlawful arrest. The Wisconsin Supreme Court decided this case on April 2, 1990. *State v. Walker,* 154 Wis.2d 158, ___ N.W.2d ___ (1990).

On April 18, 1990, the United States Supreme Court decided *New York v. Harris,* 495 U.S. ___, 109 L.Ed.2d 13, 110 S.Ct. ___ (1990), which holds that where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton v. New York,* 100 S.Ct. 1371 (1980). Based upon the findings set forth below, this court concludes that under the rationale of *Harris, supra,* the lineup identification evidence was not an exploitation of Walker's

illegal arrest, and, therefore, said lineup identification evidence will not be suppressed.

Walker was illegally arrested on September 4, 1986, in the rear yard of his residence at 6518-14th Avenue in Kenosha. The arrest occurred at approximately 8:30 p.m. and involved Detective Kopesky and Officers Salas and Dolnik of the Kenosha Police Department. Walker was arrested on three charges: operating after revocation, party to the crime of auto theft and obstructing (State's Exhibit 10). He was arrested without a warrant and absent any circumstances justifying the lack of a warrant. The facts leading to the arrest are as follows.

On September 3, 1986, shortly after 11:00 p.m., Kenosha police officers Laudonio and Lienenweber and Detective Perri investigated an apparent car theft from the parking lot of the 5th Amendment tavern. Laudonio apprehended a juvenile, D.N., driving a 1977 Ford van, the stolen vehicle. D.N. told Laudonio that Walker had hot-wired the van, and that Walker had a gun on the seat of his car. D.N. later told Leinenweber that Walker owned a Dierringer [sic]. D.N. also told Detective Zastro the same information, specifically that D.N. saw the gun on Walker's car seat on September 2, 1986 and that the gun had six bullets in it.

Laudonio and Perri both knew Walker was a suspect in several armed robberies. At the close of their shift they left the information regarding the van theft for the detectives investigating the armed robberies. In addition, Lienenweber's check on Walker yielded two commitments for failure to pay fines, an alias, and active probation and parole status.

Before arresting Walker on September 4, 1986, Detective Kopesky contacted Dennis Flynn of probation and parole to report that Walker had two active commitments and was a suspect in an auto theft. Kopesky asked Flynn if Flynn would place a "verbal hold" on Walker if he were picked up and Flynn answered that he would. At approximately 7:45 p.m. Kopesky went to Walker's residence intending to wait for Walker to leave the residence. At some point Kopesky went to the front of the residence and looked through a window and saw Walker going out a rear door. Within moments, Salas and Dolnik arrested Walker in his back yard.

Kopesky advised Walker he was under arrest for the auto theft and the two commitments. Kopesky knew Walker from prior occasions and was aware Walker was a suspect in the armed robberies. No one told Kopesky a lineup was planned before it took place. Once back at the Public Safety Building Kopesky called Flynn to tell him Walker was in custody. The arrest report (State's Exhibit 10) indicates Flynn authorized a parole hold on Walker, although Flynn did not specifically recall that.

Lawrence Mahoney, field supervisor for the Department of Corrections, testified that verbal parole holds are done routinely to deter someone who is suspected of a violation of the terms of his parole, who is suspected of committing a crime, who has not paid a forefeiture [sic] or for other non-criminal matters. (There is no dispute that Walker was on parole at all times relevant to this case.) Mahoney signed the Order to Detain Walker on September 5, 1986, although he has only a vague memory of signing it. Harold Reich, Walker's parole agent in 1986, was not personally involved in placing the hold on

Walker, but would have placed a hold on Walker if Reich had been advised of the suspected auto theft.

The clearest testimony regarding the parole hold came from Kathy Drissel, an employee of the Kenosha Sheriff's Department on September 4, 1986. Part of her duties included preparation of booking documents. She filled out the arrest sheet, Exhibit 10, at 10:30 p.m., and noted "verbal p o hold Flynn" in her own writing on the face of the arrest sheet. She typed Exhibit 11, the Booking Sheet, at 11:35 p.m. on September 4, 1986, and typed "verbal p o hold Flynn." She crossed off Flynn's name when the signed Order to Detain came from Mahoney on September 5, 1986. Drissel testified that although she had no specific recollection of preparing Exhibit 11, infuding [sic] the fact of the "verbal p o hold," she would not have initialed it if she didn't write it. Her handwritten initials appear as the last entry on Exhibit 11.

Detective Gary Sentieri testified that he arrived at work on September 5, 1986 at 7:00 a.m. Sentieri had been investigating the armed robberies and had been advised by Detective Zastrow on September 4, 1986, that D.N. had implicated Walker in the auto theft and had provided information that Walker owned a red hat and jacket, items identified in one of the armed robbery cases. Walker's description also matched the descriptions given in the armed robbery reports. At approximately 7:40 a.m., Sentieri advised Walker of his Miranda rights and attempted to interview Walker regarding circumstances surrounding the theft of the van and the armed robberies. Walker refused to speak to Sentieri, indicating he wanted to talk to an attorney. Sentieri then arranged for a lineup

and had five witnesses view six black males in the lineup between 9:50 and 10:40 a.m. on September 5, 1986.

In *New York v. Harris, supra,* the defendant was arrested in his home without a warrant. He allowed the arresting officers to enter his home. At that point the officers read Harris his Miranda rights. Harris indicated he understood those rights and admitted he had killed the victim. Harris was then arrested and taken to the station house where he again was advised of his Miranda rights and signed a written inculpatory statement. At the time of his arrest, the officers had various facts within their knowledge to give them probable cause to believe Harris had killed the victim.

In reaching the conclusion that the second statement taken from Harris at the station house was admissible as evidence, the Supreme Court noted that the rule in *Payton, supra,* was designed to protect the physical integrity of the home. It was not intended to grant criminal suspects protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime. Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given his Miranda warnings and allowed to talk. The Supreme Court distinguished *Brown v. Illinois,* 95 S.Ct. 2254 (1975), *Dunaway v. New York,* 99 S.Ct. 2248 (1979) and *Taylor v. Alabama,* 102 S.Ct. 2664 (1982). In each of those cases evidence obtained from a defendant following arrest was suppressed because the police lacked probable cause to arrest.

In this case the officers had probable cause to arrest Walker for a crime based upon the statements of D.N. In addition, the officers could take Walker into custody on the two civil commitments. While the arrest of Walker was unlawful, his custody, once he was removed from his residence and taken to the Public Safety Building, was lawful, based upon the probable cause. Although Walker did not admit the officers into his residence, as did Harris, the court does not find that fact of particular significance. Had Walker freely admitted Detective Kopesky into his home, the arrest still would have been unlawful. The distinguishing fact in both Harris and Walker is the probable cause to arrest.

The next question is whether, once Walker was in lawful custody on unrelated matters, he could be required to participate in the lineup for the armed robberies in which he was a suspect but for which there was no probable cause to hold him in custody at the time of the lineup. This issue has been addressed and thoroughly analyzed in *State v. Wilks*, 121 Wis.2d 93, 358 N.W.2d 273 (1984). *Wilks* involved a suspect who was in custody for a civil offense and then required to participate in a lineup for unrelated criminal matters. The Supreme Court opinion notes the balancing test which must be applied in determining whether to suppress lineup evidence obtained when a suspect is in custody on unrelated matters. The court will not here repeat the extensive analysis by Justice Callow in *Wilks, supra*. In summary, the incarcerated individual has an interest in his personal liberty and in the expectation of privacy, and the state has a valid interest in identifying perpetrators of crimes. The

court then concludes that the state's interest outweighed that of Wilks. The court noted:

> . . . "There is no question but that if Wilks had been in custody for a criminal offense, he could have been required to stand in a lineup for another unrelated criminal charge. We see no distinction between a criminal and a civil arrest for purposes of requiring the incarcerated person to participate in a lineup. Since the person is already in custody, no additional deprivation of liberty is involved. A person who has been placed under valid detention does not have the same expectation of privacy as a person at liberty. The reasonable expectation of privacy in concealing one's physical appearance is small. Consequently, we hold that a person who is lawfully in custody for a civil offense may be required to participate in a lineup for an unrelated criminal offense." *State v. Wilks, supra,* 121 Wis.2d at p. 106.

Walker was in lawful custody. The officers had probable cause to arrest him for theft of the van. A parole hold was placed on him sometime before midnight of September 4, 1986. There were two commitments for him outstanding at the time of his arrest. Once he was in custody, Walker's expectation of privacy in concealing his physical appearance was small. This court concludes that the state's interest in identifying the perpetrator of the armed robberies outweighed Walker's expectation of privacy once he was in lawful custody. Under *Wilks, supra,* Walker was properly required to participate in the lineup for the armed robberies.

Finally, defense counsel argues that it is not for this court to resolve the issues in this case under the rule of *Harris, supra,* but that a rehearing should have been

requested before the Wisconsin Supreme Court. However, the factual record regarding Walker's arrest, the parole hold, D.N.'s statements concerning the van theft and the subsequent lineup was virtually nonexistent at the time of remand. An appellate court would have no record upon which to analyze the impact of *Harris* on this case.

Based upon the foregoing analysis the court concludes that Walker was in lawful custody at the time he participated in the lineup, and that therefore the lineup evidence is admissible at the time of trial. In light of this conclusion this court need not address whether the in-court identification by any witness who viewed Walker in the lineup must be suppressed.

THEREFORE, IT IS HEREBY ORDERED that the motion to suppress the lineup identification evidence is denied.

Dated this 7th day of September, 1990.

BY THE COURT:

/s/ Barbara A. Kluka

BARBARA A. KLUKA
CIRCUIT JUDGE

cc: Attorney Becker
Attorney Vetzner
Attorney Sumpter

No. 90-41

In The

Supreme Court of the United States

October Term, 1990

STATE OF WISCONSIN,

Petitioner,

v.

LIONEL D. WALKER,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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TABLE OF CONTENTS

Page

PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL STATEMENT OF THE CASE..... 1

ARGUMENT 2

I. WALKER MISLEADS THIS COURT AND MISREPRESENTS THE STATE COURT PROCEEDINGS WHEN HE ASSERTS THAT PETITIONER FAILED TO RAISE ITS *BATSON* CHALLENGE IN THE WISCONSIN COURTS..... 2

II. CONTRARY TO WALKER'S BELIEF, PETITIONER HAS NOT ASKED THIS COURT TO REVIEW THE WISCONSIN SUPREME COURT'S DISCRETIONARY DECISION TO REVIEW WALKERS' *BATSON* CLAIM. RATHER, PETITIONER HAS ASKED THIS COURT TO REVIEW THE WISCONSIN SUPREME COURT'S APPLICATION OF *BATSON* ITSELF 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases Cited

Batson v. Kentucky, 476 U.S. 79 (1986) 2, 5, 6, 7, 8

State v. Cleveland, 118 Wis. 2d 615, 348 N.W.2d 512 (1984) 3, 4, 5, 6

State v. Schumacher, 144 Wis. 2d 388, 424 N.W.2d 672 (1988) 3

State v. Walker, 154 Wis. 2d 158, 453 N.W.2d 127 (1990) 5, 7

Steagald v. United States, 451 U.S. 204 (1981) 5

Strickland v. Washington, 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984) 4

Vollmer v. Luety, 156 Wis. 2d 1, 456 N.W.2d 797 (1990) 4

Statutes Rules Cited

Wis. Stat. § 809.30(2)(h) 1

Wis. Stat. § 974.06 1

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PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL STATEMENT OF THE CASE

Respondent Lionel Walker correctly notes that his postconviction proceeding in the Wisconsin courts arose under Wis. Stat. § 809.30(2)(h), not under Wis. Stat. § 974.06. Respondent's Brief at 1-2. Petitioner regrets and apologizes for the erroneous ascription. With respect to the questions presented in the petition, however, a state postconviction proceeding under one statute rather than the other makes no difference: under either statute, Walker had the right to raise the same substantive and procedural claims about his trial counsel's performance, the State of Wisconsin had the right to raise the same

defenses to those claims, and the Wisconsin courts had the same authority to resolve the issues raised. In short, the statutory numbers differ, but the result remains the same, procedurally and substantively.

Walker discounts the 17-month delay in raising his *Batson* objection.[1] Respondent's Brief at 2. Walker does not dispute that his trial counsel failed to make a timely objection at trial to the prosecutor's peremptory strike. Thus, whether Walker failed to object for seventeen months or seventeen days after trial, the question presented by the petition remains unchanged: whether a timely objection at trial is prerequisite to obtaining relief under *Batson*.

ARGUMENT

I. WALKER MISLEADS THIS COURT AND MISREPRESENTS THE STATE COURT PROCEEDINGS WHEN HE ASSERTS THAT PETITIONER FAILED TO RAISE ITS *BATSON* CHALLENGE IN THE WISCONSIN COURTS.

In urging denial of the petition, Walker asserts that the State of Wisconsin "[n]ot only . . . fail[ed] to raise its present challenge in the Wisconsin courts, but it also gave no indication that resolving the case under a *Batson* analysis was problematic in any way." Respondent's Brief at 4.

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Walker's assertion is false.

In the Wisconsin Court of Appeals, Walker advanced a state procedural argument based on *State v. Cleveland*, 118 Wis.2d 615, 348 N.W.2d 512 (1984).[2] In *Cleveland*, the Wisconsin Supreme Court exercised its discretionary authority to review a waived error related to defense counsel's failure to seek suppression of evidence seized pursuant to an improperly executed no-knock warrant. Walker urged the Wisconsin Court of Appeals to follow the *Cleveland* procedure and to take discretionary review of his *Batson* claim; because Walker's trial counsel failed to make a *Batson* objection at trial, the objection had been waived and Walker was not entitled to raise the claim as a matter of right.

Walker notes that the State did not respond to this argument in its brief. Respondent's Brief at 3-4. Walker neglects to mention why, however. The reason was simple: the Wisconsin Court of Appeals lacked the authority to follow the procedure Walker urged, and Walker's argument was meritless on its face.

About nine months before the parties briefed this case in the state court of appeals, the Wisconsin Supreme Court emphatically circumscribed the court of appeals' authority for discretionary review of waived errors. *State v. Schumacher*, 144 Wis.2d 388, 424 N.W.2d 672 (1988). Under *Schumacher*, when a party fails to object to an error in the trial court, the Wisconsin Court of Appeals has discretionary authority to review the error on either of

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[2] Walker has filed with the clerk of this Court the parties' state court briefs.

two grounds: a claim that the error resulted in the controversy not being fully tried, or a claim that "it is probable that justice has for any reason miscarried and the appellate court can conclude that a new trial would probably produce a different result." *Vollmer v. Luety*, 156 Wis.2d 1, 27, 456 N.W.2d 797, 809 (1990) (Bablitch, J., concurring) (concurrence joined by 5 of the 6 other justices).

Walker did not advance either ground as a reason for the Wisconsin Court of Appeals to review the waived *Batson* objection in his case. Consequently, the court of appeals clearly lacked authority to do what Walker suggested, and the State therefore ignored the *Cleveland* argument, which, on its face, lacked merit. The State did, however, respond to the claim of ineffective assistance of counsel raised under *Strickland v. Washington*, 466 U.S. 668, *reh'g denied*, 467 U.S. 1267 (1984) – a claim the court of appeals had authority to review.

The Wisconsin Court of Appeals did not decide Walker's appeal. Instead, the court certified the case to the Wisconsin Supreme Court, which accepted certification and ordered that the briefs filed in the court of appeals serve as the briefs in the supreme court. *See* Petition at 9 (noting that the parties did not file additional briefs).

At oral argument in the Wisconsin Supreme Court, the State addressed the *Cleveland* procedure.[3] In response to Justice Shirley Abrahamson's question whether the court could "go right to the substantive issue [of the

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[3] Walker has filed with the clerk of this Court the transcript of the oral argument in the Wisconsin Supreme Court.

Batson claim]," Transcript of Oral Argument at 48, State's counsel responded (as Walker notes at page 4 of his brief), "I think you can do that," Transcript at 48.

Walker flatly misstates the record, however, in asserting that this agreement about a state procedural matter also constituted acquiescence in the Wisconsin Supreme Court's subsequent interpretation and application of *Batson* in *State v. Walker*, 154 Wis.2d 158, 453 N.W.2d 127 (1990). As shown by the transcript of oral argument, the State repeatedly noted that a timely objection was prerequisite to relief under *Batson*.

The State's petition thus does not constitute, as Walker claims, a "belated challenge." Respondent's Brief at 4. The State addressed Walker's state procedural argument under *Cleveland* in the first forum – the Wisconsin Supreme Court – in which the argument had any merit under state law. There, the State agreed that, as a matter of state law, the state supreme court could, in its discretion, review the *Batson* claim on its merits. The review of the *Batson* claim itself, however, required the court to apply federal standards, including (as the State has consistently argued) a requirement of a timely objection in order to obtain relief under *Batson*.

Consequently, Walker misplaces his reliance on *Steagald v. United States*, 451 U.S. 204 (1981). The State has not reversed its position here, as the government did in *Steagald*. The State has taken a consistent position throughout: a valid *Batson* claim and ensuing relief require a timely objection to the prosecutor's peremptory strike.

II. CONTRARY TO WALKER'S BELIEF, PETITIONER HAS NOT ASKED THIS COURT TO REVIEW THE WISCONSIN SUPREME COURT'S DISCRETIONARY DECISION TO REVIEW WALKER'S *BATSON* CLAIM. RATHER, PETITIONER HAS ASKED THIS COURT TO REVIEW THE WISCONSIN SUPREME COURT'S APPLICATION OF *BATSON* ITSELF.

The State agrees with Walker "that procedural default in a state prosecution is a state law question." Respondent's Brief at 6. For that reason, the State has not asked this Court to assess the propriety of the Wisconsin Supreme Court's decision to exercise discretionary review under *Cleveland*, 118 Wis.2d 615. Rather, the State has petitioned for certiorari review of the Wisconsin Supreme Court's interpretation and application of *Batson* once that court decided to conduct a discretionary review.

Walker obviously fails to understand the point, probably because he sees a *Batson* objection as having only a state procedural character. The State, however, has argued (consistent with other court decisions cited in the petition) that a timely objection is an essential element of a *Batson* claim.

A failure to make a *Batson* objection operates in two dimensions. As a matter of state law, a court can treat the failure to object as a procedural error precluding appellate review as of right but nonetheless permitting the discretionary review of the error. That's what the Wisconsin Supreme Court did.

On the merits of a *Batson* claim, however, a court must treat the failure to object as a matter of the federal substance of *Batson*, which requires a timely objection;

without a timely objection, a defendant does not have a *Batson* claim. In effect, the merits of a *Batson* claim raised in the wake of a failure to object are that the claim has no merit because of the failure to object. That's where the Wisconsin Supreme Court erred – it failed to acknowledge the substantive component of the objection – and that's the aspect of *Walker* the State urges this Court to review.

The State does not dispute Walker's assertion that the facts were as fully developed as a 17-month delay allows. Respondent's Brief at 8. But that assertion underscores the error in the Wisconsin Supreme Court's application of *Batson*. Until the Wisconsin Supreme Court decided *Walker*, only a timely *Batson* objection stood between a prosecutor and his or her unfettered exercise of peremptory strikes. In the absence of a timely *Batson* objection, a prosecutor had no obligation to justify his or her peremptory strike of any juror. A prosecutor could peremptorily strike any juror, black or white, for any reason and without asking that juror any questions to discern a "disqualifying attitude." Now, according to the Wisconsin Supreme Court, an objection at any time suffices to force a prosecutor to justify a peremptory strike.

Petitioner believes, along with courts in jurisdictions other than Wisconsin, that this Court did not intend a "timely objection" under *Batson* to include an objection made after trial ends. That's the federal error committed by the Wisconsin Supreme Court when it elected to review Walker's *Batson* claim, and that's the federal-law question the State of Wisconsin urges this Court to review.

CONCLUSION

This Court should grant the petition for a writ of certiorari and review the Wisconsin Supreme Court's application of this Court's decision in *Batson*.

Dated this 22nd day of October, 1990.

Respectfully submitted,

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